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Supreme Court, U.S.
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No. ——— OFFICE OF THE CLERK

In the Supreme Court of the United States

MASSEY ENERGY COMPANY AND CENTRAL WEST VIRGINIA ENERGY COMPANY,

Petitioners,

v.

WHEELING PITTSBURGH STEEL CORPORATION AND MOUNTAIN STATE CARBON, LLC,

Respondents.

On Petition for a Writ of Certiorari to The Supreme Court of Appeals of West Virginia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fourteenth Amendment requires States to afford litigants at least one appeal as of right to review judgments awarding substantial compensatory and/or punitive damages.

2. Whether the Due Process Clause of the Fourteenth Amendment prohibits a court from deciding a case with the participation of a judge who has publicly and harshly attacked one of the parties over an extended period.

RULE 29.6 STATEMENT

Petitioner Massey Energy Company, a publicly traded company, has no parent corporation. Fidelity Management & Research owns 10% or more of its stock. Petitioner Central West Virginia Energy Company is a subsidiary of Massey Energy Company, which owns more than 10% of its stock. No other publicly traded corporation owns 10% or more of Central West Virginia Energy's stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT 2

A. Appellate Review in West Virginia 4

B. Justice Starcher's Animus Towards Massey 5

C. Proceedings in the Trial Court 7

D. Proceedings in the West Virginia Supreme Court of Appeals 8

REASONS FOR GRANTING THE PETITION 12

I. REVIEW IS WARRANTED TO DECIDE WHETHER DUE PROCESS REQUIRES A STATE TO AFFORD DEFENDANTS A RIGHT TO APPEAL SUBSTANTIAL JUDGMENTS, ESPECIALLY THOSE IMPOSING LARGE PUNITIVE EXACTIONS.. 13

A. The Supreme Court of Appeals Violated Due Process By Refusing To Review The $243 Million Judgment In This Case. 13

B. The Issue Is Exceptionally Important. 24

TABLE OF CONTENTS—continued

Page

II. REVIEW IS WARRANTED TO DECIDE WHETHER DUE PROCESS PROHIBITS A JUDGE WITH A HISTORY OF PERSONAL ATTACKS AGAINST A PARTY FORM PARTICIPATING IN THE CASE. 26

CONCLUSION 33

APPENDIX A: Order of the West Virginia Supreme Court of Appeals (May 22, 2008) 1a

APPENDIX B: Order of the West Virginia Supreme Court of Appeals (May 22, 2008) 3a

APPENDIX C: Order of the West Virginia Supreme Court of Appeals (Dec. 19, 2007) 5a

APPENDIX D: Memorandum of Justice Larry Starcher (Apr. 24, 2008) 8a

APPENDIX E: Order of the Circuit Court of Brooke County, West Virginia (Aug. 2, 2007) 19a

APPENDIX F: Order of the Circuit Court of Brooke County, West Virginia (Aug. 31, 2007) 33a

APPENDIX G: Constitutional and Statutory Provisions Involved 35a

APPENDIX H: State Statutes Governing Appeal in Civil and Criminal Cases 38a

TABLE OF AUTHORITIES

Page(s)

CASES

Aetna Life Ins. Co. v. *Lavoie*,
475 U.S. 813 (1986) 27, 30, 31, 32

Aken v. *Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662 (N.M. 2002) 16

Am. Cyanamid Co. v. *FTC*,
363 F.2d 757 (6th Cir. 1966) 31

Berkshire Employees Ass'n v. *NLRB*
121 F.2d 235 (3d Cir. 1941) 31

Biggins v. *Lambert*,
73 N.E. 371 (Ill. 1905) 31

Billotti v. *Dodrill*,
394 S.E.2d 32 (W. Va. 1990) 4

Bolton v. *Thomson*,
84 Eng. Rep. 724 (K.B. 1674) 19

Bracy v. *Gramley*,
520 U.S. 899 (1997) 26

Bradshaw v. *McCotter*,
796 F.2d 100 (5th Cir. 1986) 31, 32

Caperton v. *A.T. Massey Coal Co., Inc*,
No. 33350, 2007 W. Va. LEXIS 119
(Nov. 21, 2007) 9, 10

Caperton v. *A.T. Massey Coal Co., Inc*,
No. 33350, 2008 W. Va. LEXIS 22
(Apr. 3, 2008) 10

Caples v. *Taliaferro*,
200 So. 378 (Fla. 1941) 31

Chambers v. *Robinson*, 93 Eng. Rep. 787
(K.B. 1726) 19

TABLE OF AUTHORITIES—continued

Page(s)

Cinderella Career & Finishing Schs., Inc. v. *FTC*, 425 F.2d 583 (D.C. Cir. 1970) 31

Clerk v. *Udall*, 91 Eng. Rep. 552 (K.B. 1702) 19

Connecticut v. *Doehr*, 501 U.S. 1 (1991) 21

Cooper Indus., Inc. v. *Leatherman Tool Group*, 532 U.S. 424 (2001) 15, 16

Daka, Inc. v. *McCrae*, 839 A.2d 682 (D.C. 2003) 16

Estate of Tawney v. *Columbia Natural Resources, LLC*, No. 32966 (W. Va. May 22, 2008) 25

Franz v. *Hilterbrand*, 45 Mo. 121 (1869) 19

Gall v. *United States*, 128 S. Ct. 586 (2008) 22

Goodheart v. *Casey*, 565 A.2d 757 (Pa. 1989) 32

Griffin v. *Illinois*, 351 U.S. 12 (1956) 22

Harton v. *Reavis*, 4 N.C. 256 (1815) 19

Hicks v. *City of Watonga*, 942 F.2d 737 (10th Cir. 1991) 31

Honda Motor Co. v. *Cberg*, 512 U.S. 415 (1994) ..... *passim*

Johnson v. *Sturdivant*, 758 S.W.2d 415 (Ark. 1988) 31

TABLE OF AUTHORITIES—continued

Page(s)

Jones v. *Barnes*,
463 U.S. 745 (1983) 21, 22

Matthews v. *Eldridge*,
424 U.S. 319 (1976) 20, 21

Mayberry v. *Pennsylvania*,
400 U.S. 455 (1971) 27, 28

McKane v. *Durston*,
153 U.S. 684 (1894) 21

McKinley v. *Chicago & N.W. R.R.*,
44 Iowa 314 (1876),
aff'd 99 U.S. 147 (1878) 20

Mistretta v. *United States*,
488 U.S. 361 (1989) 22

In re Murchinson,
349 U.S. 133 (1955) 26, 27

Nationwide Mut. Ins. Co. v. *Clay*,
525 So.2d 1339 (Ala. 1987) 31

Offutt v. *United States*,
348 U.S. 11 (1954) 27, 28

Pac. R.R. v. *Hause*,
1 Wyo. 27 (1871) 19

Pacific Mut. Life Ins. Co. v. *Haslip*,
499 U.S. 1 (1991) 13, 14, 15

Philip Morris USA v. *Williams*,
127 S. Ct. 1057 (2007) 13, 16

Powell v. *Anderson*,
660 N.W.2d 107 (Minn. 2003) 31

Queen v. *Justices of Hertfordshire*,
115 Eng. Rep. 284 (Q.B.1845) 31

TABLE OF AUTHORITIES—continued

Page(s)

Queen v. *Meyer*,
1 Q.B.D 173 (1875) 31
Queen v. *Justices of Suffolk*,
118 Eng. Rep. 156 (Q.B.1852) 30
Roberts v. *Swift*,
1 Yeates 209 (Pa. 1793) 19
Rogers v. *Henry*,
32 Wis. 327 (1873) 19
Rollins v. *Connor*,
69 A. 777 (N.H. 1908) 31
Ross v. *Moffitt*,
417 U.S. 600 (1974) 21
Simon v. *San Paolo U.S. Holding Co.*,
113 P.3d 63 (Cal. 2005) 16
Smith v. *Robbins*,
528 U.S. 259 (2000) 21
State ex rel. Langer v. *Kositzky*,
166 N.W. 534 (N.D. 1918 32
State ex rel. Getchel v. *Bradish*,
70 N.W. 172 (Wis. 1897) 31
State v. *Lund*,
718 A.2d 413 (Vt. 1998) 32
State Farm Mut. Auto. Ins. Co. v. *Campbell*,
538 U.S. 408 (2003) 16, 23
Stivers v. *Pierce*,
71 F.3d 732 (9th Cir. 1995) 31
Stroud v. *Lints*,
790 N.E.2d 440 (Ind. 2003) 16

TABLE OF AUTHORITIES—continued

Page(s)

Taylor v. *Hayes*,
418 U.S. 488 (1974) 27, 28
TXO Production Corp. v. *Alliance Resources Corp.*, 509 U.S. 443 (1993) 14, 17
United States v. *Meyer*,
462 F.2d 827 (D.C. Cir. 1972) 27
United States v. *Microsoft Corp.*,
253 F.3d 34 (D.C. Cir. 2001) 29
Ward v. *Village of Monroeville*,
409 U.S. 57 (1972) 27
Wilford v. *Berkeley*,
97 Eng. Rep. 472 (K.B. 1758) 19
Withrow v. *Larkin*,
421 U.S. 35 (1975) 26
Wood v. *Gunston*,
82 Eng. Rep. 867 (K.B. 1655) 19

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

28 U.S.C. § 1257(a) 1
28 U.S.C. § 2403(b) 1
VA. CODE § 8.01-38.1 17
W. VA. CONST. art. 8, § 4 4
W. VA. R. APP. P. 3 4
W. VA. R. APP. P. 5 4
W. VA. R. APP. P. 7 ..... 4, 5
W. VA. R. APP. P. 8 5
W. VA. R. APP. P. 9 ..... 4, 5

TABLE OF AUTHORITIES—continued

Page(s)

W. VA. R. APP. P. 10 5
W. VA. R. APP. P. 11 5
W. VA. R. APP. P. 12 5
W. VA. R. APP. P. 29 9
S. Ct. Rule 29.4(c) 1

MISCELLANEOUS

Am. Bar Ass'n, Comm'n on Standards of Judicial Admin., Standards Relating to Appellate Courts § 3.10 (1994 ed.) 18
Am. Tort Reform Found., *Judicial Hellholes 2007* 24
Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913 (1997) 19
Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049 (2004) .. 15, 16
Christian Giggenbach, *Benjamin: Child rapist probation a mistake*, REGISTER-HERALD, Oct. 22, 2004, at 7B 6
MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS (3d ed. 2007) 18
Leonard E. Gross, *Time and Tide Wait for No Man: Should Lost Personal Time Be Compensable*, 33 RUTGERS L.J. 683 (2002) 15
James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459 (1975) 18

TABLE OF AUTHORITIES—continued

Page(s)

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ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES (1941) 20

Vicky Smith, *Blankenship marks Starcher for defeat*, CHARLESTON GAZETTE, Oct. 27, 2005, at 7A 6

Justice Larry V. Starcher, Remarks at Va. Trial Lawyers Ass'n Annual Convention (Apr. 2, 2005) 6

Justice Larry V. Starcher, Interview, Tr. of WOWK News 13 Broadcast (Oct. 28, 2005, 11p.m.) 7

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ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES (2d ed. 1989) 4

Juliet A. Terry, *Justice's criticism of Massey angers high school students*, THE STATE J. (WV), Jan. 3, 2003, at 9 5

U.S. Chamber Institute for Legal Reform, *Lawsuit Climate 2008: Ranking the States* 24

VerdictSearch, *Top 100 Verdicts of 2007* 25

TABLE OF AUTHORITIES—continued

Page(s)

Sarah K. Winn, *Massey chief 'stupid,' justice asserts*, SATURDAY GAZETTE MAIL, Oct. 29, 2005, at A1 6

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Massey Energy Company ("Massey") and Central West Virginia Energy Company ("CWVEC"), respectfully petition for a writ of certiorari to review the orders of the Supreme Court of Appeals of West Virginia denying their petitions for appeal.[1]

OPINIONS BELOW

The orders of the Supreme Court of Appeals denying petitioners' petitions for appeal (App., *infra*, 1a-4a) are unreported. The orders of Justice Starcher denying petitioners' motion and renewed motion for recusal (*id.* at 5a-18a) are unreported. The relevant orders of the circuit court (*id.* at 19a-34a) are unreported.

JURISDICTION

The orders of the Supreme Court of Appeals denying the petitions for appeal were entered on May 22, 2008. The jurisdiction of this Court rests on 28 U.S.C. § 1257(a). Because the constitutionality of West Virginia's failure to afford litigants at least one appeal as of right is drawn into question by this petition, 28 U.S.C. § 2403(b) may apply. Pursuant to this Court's Rule 29.4(c), petitioners have therefore served this petition on the Attorney General of West Virginia.

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[1] Petitioners are simultaneously filing a separate petition for a writ of certiorari (the "Circuit Court Petition") seeking review of the underlying orders of the Circuit Court of Brooke County, the highest court in West Virginia to decide petitioners' substantive claims on the merits.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reproduced in the Appendix. App., *infra*, 35a-37a.

STATEMENT

A West Virginia jury ordered petitioners to pay respondents $119 in compensatory damages and $100 million in punitive damages. The trial court upheld the award and added $24 million in prejudgment interest. Petitioners filed petitions for appeal in the West Virginia Supreme Court of Appeals—the State has no intermediate appellate court and the jurisdiction of the Supreme Court of Appeals is discretionary—but the court refused to review the case. As things now stand, therefore, petitioners must pay a damages award of nearly a quarter of a billion dollars—the Nation's seventh largest verdict in 2007—that was reviewed by a grand total of one judge. That is an intolerable result. It is also unconstitutional.

This Court's decisions establish a due-process right to appellate review of punitive-damages awards. The Court has held that appellate review of punitive awards must be *de novo*, and it has made clear that such review is a constitutional requirement. If the Constitution prohibits deferential review of punitive awards, it necessarily prohibits States from affording *no* appellate review of punitive awards. Yet that is precisely what occurred both here and in other cases in West Virginia, the only State in which there is no right to appellate review of a punitive award exceeding $350,000.

The Supreme Court of Appeals' denial of review violates due process for another reason: A judge who

participated in the consideration and disposition of the petitions was "actual[ly] bias[ed]" against petitioners. That judge—Justice Starcher—has, over the course of several years, attacked Massey and its chairman in terms so harsh as virtually to defy belief. He has said, for example, that Massey has attempted to "purchase" and "own" a seat on the Supreme Court of Appeals; that Massey's chairman is "stupid" and a "clown"; that the conduct of Massey and its chairman are "obscene," "disgusting," "highly offen[sive]," "pernicious," "evil," and "cancer[ous]"; and that Massey and its chairman are comparable to violent criminals. If those statements do not amount to actual bias requiring recusal as a matter of due process, it is hard to conceive of any case in which antagonism towards a party would require a judge's recusal. In fact, courts—including this one—have ordered recusal for far less. Indeed, in refusing to recuse himself, Justice Starcher all but dared this Court to grant review, stating that, if his decision to participate "can be argued to create due process problems of constitutional dimensions," then "so be it."

It is bad enough that petitioners received no appellate review of a nine-figure damages award and that one of the judges who participated in the decision to deny review has a demonstrated and acknowledged animus towards Massey. But the denial of review is all the more problematic because the damages of which petitioners seek review were awarded in a State—West Virginia—that has a well-deserved reputation as the most pro-plaintiff and anti-business jurisdiction in the Nation. If appellate review of a substantial punitive award, by an unbiased tribunal, is constitutionally necessary in every State, as this petition demonstrates, it is particularly

necessary in West Virginia, where staggeringly large jury verdicts are unfortunately all too common. This Court should grant certiorari to make clear that West Virginia—like every other State—must comply with these two basic requirements of due process.

A. Appellate Review in West Virginia

Unlike all other States but one, West Virginia does not afford litigants an appeal as of right. The State has no intermediate appellate court, and review by the Supreme Court of Appeals is entirely discretionary. The losing party in a West Virginia trial court must file a *petition* for appeal. W. VA. R. APP. P. 3, 5, 7; see W. VA. CONST. art. 8, § 4. If the petition is denied, the trial court's decision will go unreviewed, unless the party successfully petitions for a writ of certiorari in this Court (which, even in that event, would lack the power to correct any errors of state law).

The Supreme Court of Appeals exercises absolute discretion in deciding whether to grant or deny a petition for appeal, and it makes the decision without the full record. W. VA. R. APP. P. 7, 9; see *Billotti* v. *Dodrill*, 394 S.E.2d 32, 37 (W. Va. 1990). A petition for appeal thus resembles a petition for a writ of certiorari in this Court, except that a certiorari petition normally follows appellate review as of right in a federal or state appellate court. Unlike a grant of certiorari in this Court, moreover, a grant of leave to appeal to the Supreme Court of Appeals ordinarily requires the vote of a majority of the court's five justices. See ROBERT L. STERN, APPELLATE PRACTICE IN THE UNITED STATES 14 (2d ed. 1989).

While a party may request an opportunity to present a petition for appeal orally, the Supreme

Court of Appeals may deny that request in the exercise of its discretion. W. VA. R. APP. P. 5(a). Such a request is not regularly granted, and it was not granted here. Only if a majority of the justices vote to allow an appeal will the case be docketed, the record assembled, the appeal fully briefed on the merits, and oral argument heard. W. VA. R. APP. P. 7-12.

West Virginia stands nearly alone among the 50 States. In 39 States, as well as the federal system, parties have the right to appeal an adverse judgment to an intermediate appellate court. See App., *infra*, 38a-45a. Nine other states and the District of Columbia do not have an intermediate appellate court, but afford parties an appeal as of right to the State's highest court. See *ibid.* Only West Virginia and its "mother state"—Virginia—deny litigants at least one appeal as of right.

B. Justice Starcher's Animus Towards Massey

One member of the Supreme Court of Appeals, Justice Larry Starcher, harbors a deep-seated animus towards Massey and the company's chairman, CEO, and president, Don L. Blankenship. The existence of the animus has been demonstrated beyond any doubt by Justice Starcher himself, through a remarkable series of increasingly vitriolic statements—both judicial and extrajudicial—over the course of several years.

The statements began no later than 2002, when Justice Starcher told a group of high-school students that Massey was harming West Virginia because it reaped benefits from the State while offering nothing in return. Juliet A. Terry, *Justice's criticism of Massey angers high school students*, THE STATE J.

(WV), Jan. 3, 2003, at 9. In 2004, in connection with Mr. Blankenship's activities in the judicial-election campaign, Justice Starcher repeatedly accused Massey of attempting to "own the West Virginia Supreme Court." *E.g.*, Christian Giggenbach, *Benjamin: Child rapist probation a mistake*, THE REGISTER-HERALD, Oct. 22, 2004, at 7B. Addressing a convention of plaintiffs' lawyers several months later, Justice Starcher expressed a similar view, telling the audience that he was "highly offended" by Massey's "obscene" attempt to "purchase a seat on our Supreme Court." Remarks at Va. Trial Lawyers Ass'n Annual Convention (Apr. 2, 2005). That same year, in denying a motion for recusal filed by a Massey affiliate in another case, Justice Starcher acknowledged that he had "said that, in my opinion, Massey has not been a good corporate citizen." Letter to Clerk, *Marfork Coal Co. v. Director*, No. 051011, at 1 (W. Va. June 16, 2005).

Later in 2005, Justice Starcher was quoted as saying that Massey's chairman, Mr. Blankenship, "has no real concern or interest in the betterment of West Virginia" but was "simply on an egomaniac trip." Vicki Smith, *Blankenship marks Starcher for defeat*, THE CHARLESTON GAZETTE, Oct. 27, 2005, at 7A. In an interview with a local news station around the same time, Justice Starcher said that Mr. Blankenship was "stupid" and "doesn't know what he's talking about," and added that "I am certainly not afraid of him." Sarah K. Winn, *Massey chief 'stupid,' justice asserts*, SATURDAY GAZETTE MAIL, Oct. 29, 2005, at A1. In the same interview, Justice Starcher described Mr. Blankenship as an "outsider" and a "clown" who was "trying to buy influence like buying candy for children," conduct that Justice

Starcher said he found "disgusting." Tr. of WOWK News 13 Broadcast (Oct. 28, 2005, 11 p.m.).

C. Proceedings in the Trial Court

The underlying dispute in this case, which is described in more detail in the Circuit Court Petition (at 3-8), concerns a 1993 requirements contract between petitioner CWVEC, a supplier of coal and indirect subsidiary of petitioner Massey, and respondent Wheeling Pittsburgh Steel Company ("Wheeling Pitt"), a manufacturer of steel. In 2004, CWVEC encountered severe labor, transportation, and climatic complications that affected its ability to meet its contractual obligations. It consequently invoked a number of *force majeure* clauses, which excused performance under the contract. Trial Tr. 491, 913, 2327-2329, 2345, 2365, 2377, 4420, 4452-4454.

In April 2005, Wheeling Pitt sued CWVEC for breach of contract in the Circuit Court of Brooke County, home to the Wheeling Pitt steel factory, where many of the county's residents work. Wheeling Pitt alleged that Massey had invoked the *force majeure* clauses in order to sell its coal to other buyers at a higher price. Compl. ¶ 2. Wheeling Pitt later amended its complaint, adding a claim for misrepresentation and a demand for punitive damages. Am. Compl. ¶¶ 134-39. The amended complaint added Massey as a defendant and respondent Mountain State Carbon, LLC, Wheeling Pitt's successor in interest, as a plaintiff. *Id.* ¶¶ 7, 9.

In July 2007, a jury returned a verdict in favor of respondents. It awarded a total of $219 million in damages—$119 million in compensatory damages for which Massey and CWVEC were jointly and severally liable and $100 million in punitive damages, of

which each petitioner was liable for half. Trial Tr. 5567-83.

The parties filed post-trial motions addressing, among other things, the award of punitive damages. After rejecting petitioners' challenges to the award, the court entered judgment for the full $219 million. It also tacked on $24 million in pre-judgment interest, calculated at the above-market statutory rate of 10 percent. In subsequent orders, the court summarily denied petitioners' motion for judgment as a matter of law or, in the alternative, a new trial with respect to the punitive award. App., *infra*, 19a-34a.

D. Proceedings in the West Virginia Supreme Court of Appeals

1. Petitioners filed petitions for appeal in the West Virginia Supreme Court of Appeals. The petitions raised multiple assignments of error, among them that the trial court erred in allowing respondents to recast their breach-of-contract claim as a tort claim; that respondents did not prove each element of the misrepresentation claim; and that the trial court erroneously admitted several types of evidence, including expert testimony, evidence that had not been disclosed before trial, and evidence of alleged misconduct that was time-barred. Massey Am. Pet. for Appeal 20, 22-48, 65-74; CWVEC Am. Pet. for Appeal 12-31, 45-65. The petitions also challenged the constitutionality of the punitive award. Massey Am. Pet. for Appeal 49-65; CWVEC Am. Pet for Appeal 31-45. Massey argued that, "to guarantee the due process rights of the appellant," the court was obligated to undertake "a de novo determination" of whether a punitive award was justified and, if the court found that it was, "a de novo review" of

the size of the award. Massey Am. Pet. for Appeal 21.

Petitioners also filed a motion requesting that Justice Starcher recuse himself from participating in the case. The motion argued that recusal was necessary because Justice Starcher's "public, repeated, and derogatory statements," many of which were identified in the motion, "reveal a personal bias and deep-se[at]ed animosity against Massey." Joint Mot. to Recuse 1; see *id.* at 4-5. The motion pointed out that "[t]he underlying rationale for disqualification is based on principles of due process." *Id.* at 3.

In West Virginia, a motion to recuse is decided by the justice whose recusal is sought, W. VA. R. APP. P. 29(f), and Justice Starcher denied this motion in a short memorandum, App., *infra*, 6a-7a. Without disputing that he had made the statements Massey identified, Justice Starcher took the position that recusal was not required because he had no "financial interest in this case," did not "know any of the litigants," and did not have "personal knowledge of any disputed facts in the litigation." *Id.* at 7a.

2. At the time that Justice Starcher denied the motion for recusal, the West Virginia Supreme Court of Appeals had recently issued a decision in favor of a Massey affiliate in another case, *Caperton* v. *A.T. Massey Coal Co.*, No. 33350, 2007 W. Va. LEXIS 119 (Nov. 21, 2007). In that case, Justice Starcher had also denied a motion by the Massey affiliate requesting that he recuse himself. He elaborated on his reasons for doing so in an opinion dissenting from the decision on the merits. The opinion expressed the view that Justice Starcher was no more required to disqualify himself from cases in which Massey is a party than from cases involving murderers and wife

beaters, because, in his words, "I do decry murder and domestic violence and I speak out on it, and I also sit as a judge and hear cases involving people who are charged with those offenses." 2007 W. Va. LEXIS 119, at *106-*107 (Starcher, J., dissenting).

After the West Virginia Supreme Court of Appeals granted rehearing in *Caperton*, Justice Starcher changed his position and decided to recuse himself in that case. *A.T. Massey Coal Co.* v. *Caperton*, No. 33350 (Feb. 15, 2008), *available at* http://www.state.us/wvsca/press/caperton.pdf. Justice Starcher stated that he was recusing himself because there was "a reasonable appearance of impropriety." *Id.* at 2. He nevertheless continued to insist that he could "fairly judge" a case in which Massey was a party, in the same way that he could fairly judge "drunk drivers, spousal abuse, criminal behavior of an individual, certain reprehensible behavior of tobacco companies or the conduct of predatory lenders—behavior which I personally abhor, yet professionally pass judgment on regularly." *Id.* at 1-2. Justice Starcher also took the opportunity to state his belief that the conduct of Massey's chairman, Mr. Blankenship, had become "a pernicious and evil influence" on "the administration of justice" and had "created a cancer in the affairs of this Court." *Id.* at 3, 8-9.[2]

3. In light of Justice Starcher's recusal in *Caperton*, Massey renewed its recusal motion in this case.

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[2] On rehearing in *Caperton*, the court again ruled in favor of the Massey affiliate. *Caperton* v. *A.T. Massey Coal Co.*, No. 33350, 2008 W. Va. LEXIS 22 (W. Va. Apr. 3, 2008). A petition for a writ of certiorari in that case is pending. *Caperton* v. *A.T. Massey Coal Co.*, No. 08-22, filed July 2, 2008.

In response, Justice Starcher took the unusual steps of scheduling a hearing (which was eventually cancelled) and propounding interrogatories to Massey (which were eventually rescinded). See App., *infra*, 8a. Despite his decision to recuse himself in *Caperton*, however, Justice Starcher again declined to recuse himself here. *Id.* at 8a-18a.

In denying the motion, Justice Starcher acknowledged that he had "publicly criticized" Massey and its chairman; that he had a "publicly-stated low opinion" of Mr. Blankenship; and that he had previously described Mr. Blankenship as "stupid and a clown." App., *infra*, 16a. Justice Starcher also repeated his assertion that Mr. Blankenship had created a "cancer" in the court. *Id.* at 10a. And he again compared Massey and its chairman to violent criminals, arguing that, "while I strongly disapprove of rape, child molestation and murder, that doesn't mean I have to step aside in those cases." *Id.* at 16a.

Much of Justice Starcher's opinion was devoted to an attack on two other members of the court. The opinion discussed the fact that Chief Justice Maynard—who, unlike Justice Starcher, recused himself both in *Caperton* and in this case—had spent time with Mr. Blankenship, an old friend, while they were vacationing separately in the same part of Europe. App., *infra*, 10a-15a. The opinion also discussed the fact that Mr. Blankenship had supported Justice Benjamin, and opposed his opponent, in the 2004 judicial election and that Mr. Blankenship had done so through substantial financial contributions. *Id.* at 9a-10a, 17a-18a.

The thrust of the opinion was that Justice Starcher was refusing to recuse himself in this case only because Justice Benjamin declined to recuse

himself in *Caperton* after Justice Starcher had done so. *Id.* at 9a-10a, 16a-18a. Indeed, Justice Starcher explicitly stated that he would "step aside following the very moment that [Justice Benjamin] in this case does so." *Id.* at 17a-18a. Justice Starcher then concluded his opinion with the observation that, "[i]f my decision to participate in the instant case can be argued to create due process problems of constitutional dimensions, so be it." *Id.* at 18a.

4. The Supreme Court of Appeals subsequently denied petitioners' petitions for appeal, by a vote of five to zero. App., *infra*, 1a-4a. The orders issued by the court provided no explanation for the denial; each stated only that the court was "refus[ing] said petition for appeal." *Id.* at 1a, 3a. Justice Starcher participated in the consideration and disposition of both petitions.

REASONS FOR GRANTING THE PETITION

The Supreme Court of Appeals' refusal to review the $243 million judgment against petitioners violated due process in two independent respects. First, a litigant has a right to appellate review of substantial awards, especially punitive exactions, and West Virginia did not afford any here. Second, a litigant has a right to unbiased decisionmakers, and Justice Starcher was manifestly biased against Massey. This Court should grant review on both of these exceptionally important issues.

I. REVIEW IS WARRANTED TO DECIDE WHETHER DUE PROCESS REQUIRES A STATE TO AFFORD DEFENDANTS A RIGHT TO APPEAL SUBSTANTIAL JUDGMENTS, ESPECIALLY THOSE IMPOSING LARGE PUNITIVE EXACTIONS.

A. The Supreme Court Of Appeals Violated Due Process By Refusing To Review The $243 Million Judgment In This Case.

A money judgment constitutes a deprivation by the State of a defendant's property. For that reason, the requirements of due process apply to the procedures employed in arriving at such a judgment. See, *e.g.*, *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062-1063 (2007). And the logic of this Court's cases, especially in addressing the review of punitive damages, indicates that West Virginia's practice of refusing any appeal as of right, so far out of step with the rest of the Nation, violates due process.

1. In its decisions recognizing the constitutional limitations on punitive damages, this Court has consistently emphasized the critical role of appellate review. Indeed, those decisions compel the conclusion that appellate review of punitive awards is required as a matter of procedural due process.

a. In *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), the Court observed that, under "the traditional common-law approach," which the Court "more than once has approved," the amount of punitive damages "is initially determined by a jury" and the jury's determination "is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 15. In rejecting a due-process challenge to the punitive award in that case, the Court empha-

sized that, "[b]y its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion" and that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose." *Id.* at 20-21.

Two Terms later, in upholding a punitive award against a due-process challenge in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993), the plurality relied on the fact that the award was assessed by an impartial jury; that the award was reviewed and upheld by a trial judge who had heard the evidence; and that it "was affirmed by a unanimous decision of the State Supreme court of Appeals." *Id.* at 457 (opinion of Stevens, J.). A judgment that is "a product of that process," the plurality said, "is entitled to a strong presumption of validity." *Ibid.*

The next Term, in *Honda Motor Co.* v. *Oberg*, 512 U.S. 415 (1994), the Court held that, as a matter of procedural due process, States must afford judicial review of awards of punitive damages challenged as excessive. In so holding, the Court observed that the decisions in *Haslip* and *TXO* had "strongly emphasized the importance of the procedural component of the Due Process Clause" and had specifically emphasized the importance of appellate review. *Id.* at 420. *Haslip*, the Court explained, "stressed the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review," and *TXO* "found that the fact that the 'award was reviewed and upheld by the trial judge' and unanimously affirmed on appeal gave rise 'to a strong presumption of validity.'" *Id.* at 420-21 (quoting *Haslip*, 499 U.S. at 20, and *TXO*, 509 U.S. at 457). *Honda*

has in fact been interpreted to stand for the proposition that "appellate review of punitive damage awards [is] required." Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation*, 79 NOTRE DAME L. REV. 2025, 2027 (2004); accord Leonard E. Gross, *Time and Tide Wait for No Man: Should Lost Personal Time Be Compensable?*, 33 RUTGERS L.J. 683, 705 (2002).

b. If *Honda* did not already recognize a due-process right to appellate review of punitive awards, later decisions did. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards" and that vacatur and remand were required there because "the Court of Appeals applied an 'abuse of discretion' standard." *Id.* at 431, 436. The Court mandated *de novo* review because such review enables appellate courts "to maintain control of, and to clarify, the legal principles" governing the constitutionality of punitive awards and "tends to unify precedent and stabilize the law." *Id.* at 436 (internal quotation marks omitted). The Court found support for the requirement in *Haslip*, which "emphasized the importance of appellate review to ensuring that a jury's award of punitive damages comports with due process." *Id.* at 436 n.9 (citing *Haslip*, 499 U.S. at 20-21).

Unlike this case, *Cooper Industries* involved review of a punitive award by a *federal* appellate court. But subsequent decisions of this Court confirm that the holding of the case is based on the Due Process Clause and therefore that, as Professor Chemerinsky has put it, "state appellate courts, too, must exercise

de novo review over whether punitive damages are excessive." Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1069-1070 (2004).

Thus, in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), a case arising in state court, the Court explained that, in policing the "constitutional limitations" on punitive awards, it had "instructed courts reviewing punitive damages to consider [certain] guideposts" and had "mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award," because "[e]xacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" *Id.* at 416, 418 (citing and quoting *Cooper Indus.*, 543 U.S. at 424, 436). More recently, in *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057 (2007), another case arising in a state system, the Court explained that "the Constitution imposes certain limits[] in respect * * * to procedures for awarding punitive damages," and then listed, as one example of those constitutional limits, the rule that, under *Cooper Industries*, "review must be *de novo*." *Id.* at 1062. Consistent with those decisions, state courts have recognized that the holding of *Cooper Industries* applies to them as a matter of federal constitutional law. See, *e.g.*, *Simon* v. *San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 n.2 (Cal. 2005); *Daka, Inc.* v. *McCrae*, 839 A.2d 682, 697 (D.C. 2003); *Stroud* v. *Lints*, 790 N.E.2d 440, 442 (Ind. 2003); *Aken* v. *Plains Elec. Generation & Transmission Coop., Inc.*, 49 P.3d 662, 668 (N.M. 2002).

If the Due Process Clause of the Fourteenth Amendment requires that appellate review of puni-

tive-damages awards be *de novo*, as this Court's cases establish, the Due Process Clause must require that there be appellate review of such awards. It cannot be that, although a State is constitutionally prohibited from engaging in deferential review of a punitive award, it is not constitutionally prohibited from providing no review at all. If deferential review is unconstitutional, as it is, then *no* review is unconstitutional a *fortiori*. A State cannot avoid its obligation to provide more than deferential review by providing less.

2. Even if this Court's decisions did not establish a due process right to appellate review, including review of punitive damages, the existence of such a right would follow from the application of the procedural due process methodology employed in *Honda*. Under that approach, the Court looks both to "[m]odern practice" and to "common-law practice." *Honda*, 512 U.S. at 426, 435; see also *TXO*, 509 U.S. at 457.

a. Under the modern practice, the nearly uniform rule is that litigants are entitled to at least one appeal as of right. West Virginia is one of only two States that does not afford such a right. In the remaining 48 States and the District of Columbia, as well as the federal system, a defendant has the right to appellate review, either by an intermediate appellate court or by a supreme court with mandatory jurisdiction. See App., *infra*, 38a-45a. Indeed, as far as appellate review of substantial punitive awards is concerned, West Virginia stands alone; the other State in which there is no appeal as of right—Virginia—protects against runaway awards by imposing a $350,000 cap. VA. CODE § 8.01-38.1.

The availability of an appeal as of right in all but two jurisdictions shows that the right of appeal "is a fundamental element of procedural fairness as generally understood in this country," Am. Bar Ass'n, Comm'n on Standards of Judicial Admin., Standards Relating to Appellate Courts § 3.10, at 18 (1994 ed.), and that a litigant's entitlement to "at least one review of an adverse final decision" is "firmly rooted," James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459, 463 (1975). Accordingly, just as there was a due-process violation in *Honda* because, "[i]n the federal courts and in every State[] except Oregon, judges review the size of damages awards," *Honda*, 512 U.S. at 426, there is a due-process violation here because, in the federal courts and in every State except West Virginia and one other, appellate courts review the size of damages awards upon the defendant's request.[3]

b. Under the common-law practice, too, courts acting in an appellate capacity reviewed damages awards. All of the eighteenth- and early nineteenth-century English cases cited in *Honda* for the proposition that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded" were decisions of common-law courts that served as courts of review. *Honda*, 512 U.S. at 421; see *id.* at 421-423.[4] And there are numerous

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[3] The same consensus exists in Europe, where "[d]ecisions of the ordinary civil * * * courts of first instance may as a rule be appealed to an intermediate appellate court." MARY ANN GLENDON ET AL., COMPARATIVE LEGAL TRADITIONS 219 (3d ed. 2007).

[4] At that time in England, "the reviewing authorities for the writ of error operated under a horizontal system of 'mutual re-

other cases from that period—and earlier—in which English courts exercising an appellate function reviewed damages awards. See, *e.g.*, *Wilford* v. *Berkeley*, 97 Eng. Rep. 472, 472 (K.B. 1758) ("[t]he Court were, all three, clear and unanimous, that * * * there was no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessiveness of damages"); see also *Wood* v. *Gunston*, 82 Eng. Rep. 867 (K.B. 1655); *Bolton* v. *Thomson*, 84 Eng. Rep. 724 (K.B. 1674); *Clerk* v. *Udall*, 91 Eng. Rep. 552 (K.B. 1702); *Chambers* v. *Robinson*, 93 Eng. Rep. 787 (K.B. 1726).

State appellate courts in this country likewise reviewed damages awards—and overturned them when excessive—from the time of the Founding through the ratification of the Fourteenth Amendment and beyond. Most of the nineteenth-century cases cited in *Honda* for the proposition that "American courts reviewed * * * the amount of [damages] awards" were decisions of appellate courts. *Honda*, 512 U.S. at 425; see *ibid.* And there are many other such cases. See, *e.g.*, *Harton* v. *Reavis*, 4 N.C. 256, 257 (1815) (recognizing the "duty of the court" to set aside a damages award when the jury "acted under the influence, either of undue motives, or some gross error or misconception"); see also *Roberts* v. *Swift*, 1 Yeates 209, 212 (Pa. 1793); *Franz* v. *Hilterbrand*, 45 Mo. 121, 124 (1869); *Pac. R.R.* v. *Hause*, 1 Wyo. 27, 34 (1871); *Rogers* v. *Henry*, 32 Wis. 327, 334 (1873);

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view'" in which "the three central courts reviewed each other's decisions." Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 927 (1997). "Decisions in King's Bench were reviewed by justices from Common Pleas and the Exchequer. Decisions in Common Pleas were reviewed by justices of King's Bench. Decisions in the Exchequer were reviewed by justices of King's Bench and Common Pleas." *Ibid.*

McKinley v. *Chicago & N.W. R.R.*, 44 Iowa 314, 322 (1876), *aff'd*, 99 U.S. 147 (1878).

Moreover, the right of appellate review was by no means limited at common law to excessiveness questions, and review was not discretionary. Rather, "[t]hroughout Anglo-American justice systems in the late eighteenth century litigants were free to invoke * * * appellate jurisdiction as a matter of right." James E. Pfander, Marbury, *Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1570 (2001). At that time, in both England and the United States, "writs of error to secure review of judgments at common law[] were available to * * * petitioners in error as a matter of right." *Ibid.*; accord ROSCOE POUND, APPELLATE PROCEDURE IN CIVIL CASES 88, 116 (1941). Thus, West Virginia's system of appellate review violates due process because it departs from the tradition under which "[c]ommon-law courts in the United States," like "their English predecessors," provided a right of appellate review of money judgments. *Honda*, 512 U.S. at 424.[5]

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[5] Another methodology that the Court has sometimes employed—the three-part balancing test of *Matthews* v. *Eldridge*, 424 U.S. 319 (1976)—yields the same result: Due process requires at least one appeal of right of a substantial damages award. First, it is beyond dispute that a large damages award threatens a cognizable property interest. *Id.* at 335. Second, because one-judge trial courts commit errors in a significant number of cases and West Virginia leaves correction of those errors to a purely discretionary system of appellate review, the risk of an erroneous deprivation of the property interest is high. *Ibid.* Third, although the cost of providing appellate review of right is not inconsequential, West Virginia need not create an intermediate appellate court to do so; it need only ensure that its Supreme Court of Appeals reviews substantial judgments.

3. On a number of occasions, this Court has stated that there is no constitutional right to an appeal in a criminal case. See, *e.g.*, *Smith* v. *Robbins*, 528 U.S. 259, 270 n.5 (2000); *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Ross* v. *Moffitt*, 417 U.S. 600, 606 (1974). Those statements, however, are dicta. In all of the cases in which they appear, the State *did* provide the right to an appeal; the issue was whether the State discriminated in doing so. No decision of this Court has held that a defendant may be denied any appeal in a criminal case.

There is also good reason to believe that the statements are incorrect. The original source of the dictum—*McKane* v. *Durston*, 153 U.S. 684 (1894)—cited no support for the proposition that the Due Process Clause does not afford a right to appeal a criminal conviction. And some Justices have expressed "little doubt" that, if the question were ever presented, the Court "would decide that a State must afford at least some opportunity for review of convictions," because "[t]here are few, if any, situations in our system of justice in which a single judge is given unreviewable discretion over matters concerning a

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In any event, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard." *Id.* at 348. Indeed, because the issue here concerns disputes between private parties, the third element requires "principal attention to the interest of the [opposing] party," *Connecticut* v. *Doehr*, 501 U.S. 1, 11 (1991), and appellate review poses no threat to any legitimate interest of plaintiffs who have won a substantial money judgment. To the extent such a judgment is predicated on legal error, the system has no interest in leaving it uncorrected. As for awards of punitive damages, it is well accepted that they are in the nature of a windfall; plaintiffs have no "right" to receive any award of punitive damages, much less one that might be determined to be excessive after appellate review.

person's liberty or property" and "depriving defendants of their right to appeal would expose them to an unacceptable risk of erroneous conviction." *Jones*, 463 U.S. at 756 n.1 (Brennan, J., joined by Marshall, J., dissenting).

Even if there is no constitutional right to appellate review of a criminal conviction, moreover, it does not follow that there is no constitutional right to appellate review of substantial damages awards. It has been suggested that there is no due-process right to a criminal appeal because "no appeals from convictions in the federal courts were afforded * * * for nearly a hundred years," and "there was no appeal from convictions" in England "until 1907." *Griffin* v. *Illinois*, 351 U.S. 12, 21 (1956) (Frankfurter, J., concurring in the judgment). With respect to appeals from judgments imposing substantial damages awards, however, there is no such "historic policy." *Ibid.* In fact, the contrary is true. "[A]t the same time that a federal defendant had no right to review of his criminal conviction, * * * a federal civil litigant had a right to appeal to the Supreme Court in causes involving more than $5,000." Gary Stein, Note, *Expanding the Due Process Rights of Indigent Litigants: Will* Texaco *Trickle Down*?, 61 N.Y.U. L. REV. 463, 467 n.31 (1986). And at the same time that an English defendant had no right to review of his criminal conviction, an English civil litigant had a right to review of a damages award. See *supra*, pp. 18-20. Even after criminal defendants were granted a right of appeal, the sentencing component of the judgment, unlike a punitive award, was—as it is today—generally reviewed with great deference. *Gall* v. *United States*, 128 S. Ct. 586, 591 (2008); *Mistretta* v. *United States*, 488 U.S. 361, 364 (1989).

There would be no anomaly in holding that there is a right to appeal a substantial award of punitive damages or other civil liability but no right to appeal a criminal conviction. First, a defendant in a civil case in which punitive damages are sought does not have the benefit of the procedural protections afforded a defendant in a criminal case—the requirement of proof beyond a reasonable doubt being perhaps the most important (though hardly the only one). Second, unlike a sentence in a criminal case, which is limited by a statutory maximum (and sometimes a guidelines maximum), an award of punitive damages has no upper limit (unless the jurisdiction has imposed a cap). Third, a civil defendant against which a punitive award is entered has no entitlement to the other (non-appellate) forms of review available to a criminal defendant—state post-conviction review and federal habeas corpus.

Because a defendant facing a substantial punitive award lacks these protections, there is a greater risk that punishment will be erroneously imposed than in a criminal case. It is therefore perfectly sensible for the Constitution to afford a right to appeal a substantial punitive award, whether or not there is a right to appeal a criminal conviction. Indeed, in the same discussion in *State Farm* in which this Court made clear that parties have a constitutional right to *de novo* appellate review of a punitive-damages award, the Court pointed out that "defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding," even though "these awards serve the same purposes as criminal penalties." 538 U.S. at 417.

B. The Issue Is Exceptionally Important.

1. The fundamental unfairness of a statewide system in which a single-judge trial court can have the final say on whether a defendant must pay a substantial damages award, by itself, makes the issue in this case one of exceptional importance. Another factor makes it even more important: West Virginia's status as the most plaintiff-friendly and anti-business jurisdiction in the Nation, one in which staggeringly large verdicts against companies are routine.

According to a survey of in-house counsel, West Virginia has had the worst legal climate of the 50 States each of the past three years, "in part because of the state legislature's repeated failure to enact meaningful and comprehensive legal reform legislation, and in part because West Virginia courts are among the most anti-business in the country." U.S. Chamber Institute for Legal Reform, Lawsuit Climate 2008: Ranking the States 5, available at http://www.instituteforlegalreform.com/issues/tools/ppt/LawsuitAbuseFactFacts2008.ppt. Another tort-reform organization has labeled the entirety of West Virginia a "judicial hellhole," making it the only entire State to earn that distinction. Am. Tort Reform Found., *Judicial Hellholes 2007* at iii-iv, *available at* http://www.atra.org/reports/hellholes/report.pdf. The designation is based on the number of "massive lawsuits" that are filed and the number of "anti-business rulings" that are issued in the State—problems exacerbated by civil defendants' lack of "assurance that they will receive appellate review." *Id.* at iii.

In this case, the West Virginia Supreme Court of Appeals denied review of a judgment exceeding $200 million, approximately half of which was punitive.

On the same day, in *Estate of Tawney* v. *Columbia Natural Resources, LLC*, No. 32966, the court denied review of a judgment of approximately $400 million, more than half of which was punitive.[6] Those were two of the seven largest verdicts in the Nation in 2007; a third verdict in the top seven was also returned by a jury in West Virginia. VerdictSearch, *Top 100 Verdicts of 2007*, *available at* http://www.verdictsearch.com/index.jsp?do=top100.

The question whether defendants in West Virginia have a right to appellate review of large damages awards is exceptionally important, not only to the defendants in these three cases, but to any business that can be sued in the State. The importance of the question is confirmed by the fact that the Governor of West Virginia has taken the position, consistent with petitioners', that the Supreme Court of Appeals is obligated to review punitive-damages awards as a matter of federal constitutional law. See Br. of Joe Manchin, III, as *Amicus Curiae* in *E.I. du Point de Nemours & Co.* v. *Perrine*, No. 080721.

It is true that there is no conflict among the lower courts on the issue, but, as in *Honda*, that is not a reason to deny review. Among the 50 States, only West Virginia and Virginia do not provide an appeal as of right, and Virginia has adopted a $350,000 cap on punitive awards. Accordingly, the question whether there is a right to appellate review of punitive awards exceeding $350,000 can arise only in West Virginia.

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[6] The defendants in *Tawney* will be filing petitions for a writ of certiorari contemporaneously with the petitions in this case.

2. The circumstances of this case demonstrate why a failure to provide appellate review of a large punitive award is intolerable. They also make the case an ideal vehicle for deciding whether appellate review is constitutionally required.

As explained in the Circuit Court Petition (at 9, 26), (a) the jury imposed a punitive award of $100 million even though petitioners had no notice that their conduct could be subject to tort remedies and (b) the trial court then approved the award without considering whether a lower amount would be sufficient to serve the purposes of punishment and deterrence. The lack of notice and limited review at the trial-court level make appellate review of the punitive award in this case especially critical. Yet the Supreme Court of Appeals refused to provide any. This Court should grant certiorari to decide whether that result is permitted by the Constitution.

II. REVIEW IS WARRANTED TO DECIDE WHETHER DUE PROCESS PROHIBITS A JUDGE WITH A HISTORY OF PERSONAL ATTACKS AGAINST A PARTY FROM PARTICIPATING IN THE CASE.

A. As a consequence of his deep-seated hostility towards Massey, Justice Starcher was constitutionally obligated to recuse himself from the consideration and disposition of the petitions for appeal.

1. "[A] fair tribunal is a basic requirement of due process," and a fair tribunal "of course requires an absence of actual bias" on the part of the decisionmaker. *In re Murchinson*, 349 U.S. 133, 136 (1955). A biased decisionmaker is "constitutionally unacceptable." *Withrow* v. *Larkin*, 421 U.S. 35, 47 (1975); accord *Bracy* v. *Gramley*, 520 U.S. 899, 904-905

(1997). That means that no one may judge a case in which he or she has "an interest in the outcome." *Murchison*, 349 U.S. at 136. An "interest," in this context, is that which would lead a judge "not to hold the balance" between the parties "nice, clear, and true." *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972) (internal quotation marks omitted).

Such an interest may be financial. In *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), for example, this Court applied the principle that due process prohibits a judge from adjudicating a case if the judge has a direct and substantial pecuniary interest in the outcome. *Id.* at 821-822 (internal quotation marks omitted).

But a direct pecuniary interest is not the only type of interest that precludes a judge from acting as a decisionmaker. Actual bias requiring recusal under the Due Process Clause exists when the judge has "personal feeling against" a party, *Offutt* v. *United States*, 348 U.S. 11, 14 (1954), or an "unfavorable personal attitude toward" it, *Taylor* v. *Hayes*, 418 U.S. 488, 501 (1974); when the judge has become "embroiled in a running, bitter controversy" with the party, *Mayberry* v. *Pennsylvania*, 400 U.S. 455, 465 (1971); or when the judge otherwise harbors "hostility," *Offutt*, 348 U.S. at 16, toward the party.[7] The undisputed facts demonstrate beyond any doubt that Justice Starcher had an actual bias of this second

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[7] *Offutt* involved the exercise of this Court's supervisory powers, but the standard for actual bias applied in that case is little different from the standard applied in this Court's due process cases. See, *e.g.*, *United States* v. *Meyer*, 462 F.2d 827, 838 n.18 (D.C. Cir. 1972).

type: a deep-seated antagonism towards Massey and its chairman.

2. Over the course of the last several years, Justice Starcher has leveled a series of vituperative accusations against Massey and its chairman, Don Blankenship, so outlandish that it almost defies belief that the words could have been uttered by a justice of the State's highest court. Those statements, which are set forth in detail above, see *supra*, pp. 5-7, 9-11, include the assertions that Massey has no "concern or interest in the betterment of West Virginia" and is not "a good corporate citizen"; that Massey was attempting to "purchase" and "own" a seat on the State's Supreme Court of Appeals; that Massey's chairman, Mr. Blankenship, is "stupid" and a "clown"; that the conduct of Massey and its chairman is "obscene," "disgusting," "highly offen[sive]," "pernicious," "evil," and "cancer[ous]"; and that Massey and its chairman are comparable to violent criminals. Justice Starcher has not denied saying any of these things. On the contrary, he has candidly and unapologetically acknowledged making a number of the statements, at times repeating them with seeming relish.

If this record does not demonstrate a sufficient degree of personal antagonism to require a judge's recusal, it is difficult to imagine what would. In fact, this Court has required recusal for much less. See *Taylor*, 418 U.S. at 501-503; *Offutt*, 348 U.S. at 13-16. Indeed, it has done so in a case in which the attack was levied *by the party against the judge* (rather than the other way around). See *Mayberry*, 400 U.S. at 465-466.

Justice Starcher himself recognized that the facts recited above obligated him to recuse himself in

Caperton, where a Massey affiliate was a party, and he did ultimately recuse himself in that case. If recusal was necessary there, as it clearly was, it was equally necessary here. Cf. *United States* v. *Microsoft Corp.*, 253 F.3d 34, 115 (D.C. Cir. 2001) (finding bias under the Judicial Code based on the judge's "crude characterizations of Microsoft" and his "frequent denigrations of Bill Gates" in statements to the media).

The reason Justice Starcher did *not* recuse himself in this case was that (i) he believed that Justice Benjamin, a supposedly "pro-Massey" Justice, should have recused himself as well; (ii) Justice Benjamin gave no indication that he intended to recuse himself; and (iii) even though Justice Starcher recognized the basis for his own recusal, he believed that it was more necessary for him to remain in the case as a counterweight to Justice Benjamin. See App., *infra*, 17a-18a. Even assuming, contrary to what we believe the law to be, that Justice Benjamin was required to recuse himself, his decision not to do so is of course an impermissible basis for Justice Starcher's decision not to recuse *himself*.

In the end, Justice Starcher seemed utterly unconcerned about whether his actions violated the Constitution. He concluded his opinion denying petitioners' request for recusal with the defiant pronouncement that, if his decision to participate in the case "can be argued to create due process problems," then "so be it." App., *infra*, 18a. About that, at least, Justice Starcher was correct. Indeed, as we explain above, there is more than a mere "argu[ment]" that Justice Starcher's recusal was constitutionally required; it self-evidently was.

B. The fact that the petitions for appeal were denied unanimously does not render the due-process violation harmless. Reversal is required regardless of whether the biased judge cast the deciding vote.

1. In *Lavoie*, the biased member of the appellate court *had* cast the deciding vote against the petitioner, and this Court found reversible constitutional error on that basis. The Court did not address the question whether, regardless of the vote, "a decision of a multimember tribunal must be vacated" whenever "one member who had an interest in the outcome of the case" participated in the decision. *Lavoie*, 475 U.S. at 827; see *id.* at 827 n.4. In concurring opinions, however, three members of the Court took the view that a decision must be vacated whenever a biased judge participates. *Id.* at 830-831 (Brennan, J., concurring); *id.* at 831-833 (Blackmun, J., joined by Marshall, J., concurring in the judgment).

That view is correct. As the concurrences explained, decisionmaking by a multi-member appellate court is a "shared enterprise" in which there is an "exchange of ideas," *Lavoie*, 475 U.S. at 831, 833 (Blackmun, J.), and the participation of an interested judge "*necessarily* imports a bias into [that] deliberative process," *id.* at 831 (Brennan, J.). That was the rule in English courts in the nineteenth century—a highly relevant consideration when seeking to determine the guarantees of the Due Process Clause of the Fourteenth Amendment. See, *e.g.*, *Queen* v. *Justices of Hertfordshire*, 115 Eng. Rep. 284, 285 (Q.B. 1845) ("The magistrates discuss the question among themselves; and it is impossible to say what effect that discussion may have on the decision."); see also

Queen v. *Justices of Suffolk*, 118 Eng. Rep. 156 (Q.B. 1852); *Queen* v. *Meyer*, 1 Q.B.D. 173, 176 (1875).

2. As the Court indicated in *Lavoie*, see 475 U.S. at 827, lower courts in the United States have divided over the question. Five circuits and at least five state courts of last resort have concluded that reversal is required whenever a biased member of a multi-member tribunal participates in the consideration and disposition of the case. See *Cinderella Career & Finishing Schs., Inc.* v. *FTC*, 425 F.2d 583, 592 (D.C. Cir. 1970); *Berkshire Employees Ass'n* v. *NLRB*, 121 F.2d 235, 239 (3d Cir. 1941); *Am. Cyanamid Co.* v. *FTC*, 363 F.2d 757, 767-768 (6th Cir. 1966); *Stivers* v. *Pierce*, 71 F.3d 732, 746-748 (9th Cir. 1995); *Hicks* v. *City of Watonga*, 942 F.2d 737, 748 (10th Cir. 1991); *Nationwide Mut. Ins. Co.* v. *Clay*, 525 So.2d 1339, 1341 (Ala. 1987) (per curiam); *Johnson* v. *Sturdivant*, 758 S.W.2d 415, 416 (Ark. 1988); *Rollins* v. *Connor*, 69 A. 777, 778-779 (N.H. 1908); *Powell* v. *Anderson*, 660 N.W.2d 107, 122-123 (Minn. 2003); *State ex rel. Getchel* v. *Bradish*, 70 N.W. 172, 173 (Wis. 1897). Like the concurring Justices in *Lavoie*, those courts correctly recognize that each member of a tribunal "contributes not only his vote but also his voice to the deliberative process," *Stivers*, 71 F.3d at 747, and that reversal is required because the influence the biased member "might have upon the decision * * * cannot be estimated," *Rollins*, 69 A. at 779.

In contrast, one circuit and a number of state courts of last resort have concluded that reversal is not required when the biased member did not cast the deciding vote. See *Bradshaw* v. *McCotter*, 796 F.2d 100, 101 (5th Cir. 1986); *Caples* v. *Taliaferro*, 200 So. 378, 381-382 (Fla. 1941) (per curiam); *Big-*

gins v. *Lambert*, 73 N.E.371, 373 (Ill. 1905); *State ex rel. Langer* v. *Kositzky*, 166 N.W. 534, 535 (N.D. 1918); *Goodheart* v. *Casey*, 565 A.2d 757, 761-762 (Pa. 1989); *State* v. *Lund*, 718 A.2d 413, 418-419 (Vt. 1998). Those decisions are mistaken. None of them engages, much less refutes, the argument against their position—that the bias of any judge infects the deliberative process. And some of the decisions rest on the mistaken premise that *Lavoie* held reversal to be required only when the biased judge's vote was decisive (rather than having simply reserved the question). See *Bradshaw*, 796 F.2d at 101; *Goodheart*, 565 A.2d at 761.

C. The question whether due process was violated by Justice Starcher's participation in the consideration and disposition of the petitions for appeal is exceptionally important, and therefore warrants review. First, Justice Starcher's refusal to recuse himself despite his deep-seated animosity towards Massey brazenly disregards the due-process principles established in a long line of this Court's decisions on judicial bias. Second, this case provides the Court with an opportunity to resolve the question that was left open in *Lavoie* and has divided the lower courts: whether a biased appellate judge must cast the deciding vote in order for reversal to be required. Third, Justice Starcher's hostility towards Massey is such a shockingly egregious instance of judicial bias that the denial, with his participation, of Massey's request for review of a $243 million judgment against it simply should not be permitted to stand.[8]

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[8] It does not follow from this that the Court should grant the petition in *Caperton* v. *A.T. Massey Coal Co.*, No. 08-22, filed

CONCLUSION

The petition for a writ of certiorari should be granted.

July 2, 2008. That petition presents the question whether Justice Benjamin's refusal to recuse himself in a case in which a Massey affiliate was a party violated due process because Massey's chairman made substantial financial contributions that supported the election of Justice Benjamin, and the defeat of his opponent, in 2004. As will be explained in more detail in the brief in opposition in that case, the petition in *Caperton* should be denied because this Court's due process decisions do not require recusal of a judge with a mere "appearance" of bias, and such a standard in any event has no place in the context of campaign contributions, which are an inherent feature of elected judiciaries. In this case, in contrast, Justice Starcher's bias was self-evidently an *actual* one.

Respectfully submitted.

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Counsel for Petitioners

AUGUST 2008

APPENDIX

APPENDIX A

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2008, the following order was made and entered:

Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, Plaintiffs Below, Respondents

v.

Central West Virginia Energy Company and Massey Energy Company, Defendants Below, Petitioners

No. 080182

On a former day, to-wit, March 12, 2008, came the petitioner, Massey Energy Company, by W. Henry Jernigan, Jr., Timbera C. Wilcox, Ramonda C. Lyons and Nicholas S. Johnson, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Brooke County, rendered on the 4th day of September, 2007, with the record accompanying the petition. Thereafter, on the 11th day of April, 2008, came the respondents, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, by David B. Cross and David F. Cross; and David B. Fawcett and Gregory J. Krock, Buchanan Ingersoll & Rooney, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Chief Justice Maynard disqualified. Senior

Status Judge Jolliffe sitting by temporary assignment.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX B

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 22nd of May, 2008, the following order was made and entered:

Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, Plaintiffs Below, Respondents

v.

Central West Virginia Energy Company and Massey Energy Company, Defendants Below, Petitioners

No. 080183

On a former day, to-wit, March 13, 2008, came the petitioner, Central West Virginia Energy Company, by James A. Walls, Matthew P. Heiskell and David B. Hanna, Spilman Thomas & Battle, PLLC; and Joseph G. Nogan, Sellitti, Nogay & McCune, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Brooke County, rendered on the 4th day of September, 2007, with the record accompanying the petition. Thereafter, on the 11th day of April, 2008, came the respondents, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, by David B. Cross and David F. Cross; and David B. Fawcett and Gregory J. Krock, Buchanan Ingersoll & Rooney, their attorneys, and presented to the Court their written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Chief Justice Maynard disqualified. Senior

Status Judge Jolliffe sitting by temporary assignment.

A True Copy

Attest: /s/ Rory L. Perry II
Clerk, Supreme Court of Appeals

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 19th day of December 2007, the following order was made and entered:

Central West Virginia Energy Company and Massey Energy Company Petitioners

v.

Wheeling Pittsburgh Steel Corporation and Mountain State Carbon Respondents

No. 07-185

This day came the Honorable Larry V. Starcher, Justice of the Supreme Court of Appeals of West Virginia, and notified the Clerk of his refusal to disqualify himself from participating in the above-captioned proceeding, pursuant to Rule 29 of the Rules of Appellate Procedure.

A True Copy

/s/ Rory I. Perry

[Text Obscured] of Appeals

Supreme Court of Appeals
1900 Kanawha Boulevard, East
Charleston, West Virginia 25305
(304) 558-2604
(304) 558-4308 Fax

December 19, 2007

Larry V. Starcher
Justice

MEMORANDUM

TO: Rory Perry, Clerk

FROM: Justice Larry V. Starcher

RE: *Central West Virginia Energy Company and Massey Energy Company v. Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC*
Appeal No. _____[1]

A Joint Motion To Recuse The Honorable Larry Starcher was filed in the proceedings in the above-named case on December 10, 2007. This is, perhaps, the seventh motion to disqualify me filed on behalf of Massey Energy Company, its subsidiaries, and/or Don Blankenship, CEO of Massey.

The thrust of this Massey Motion remains the same as in the past—that I have a legally disqualifying personal bias against Mr. Blankenship and/or the Massey entities.

The drafters of the Motion simply added details from a recent dissent I filed in a Massey case.

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[1] The pleading I was presented did not have a designated "Appeal No."

My response to this Motion is the same as stated earlier. See all previous responses that are of record.

Again, I repeat that I have no financial interest in this case, do not know any of the litigants, and certainly have never socialized with any of the litigants, nor have any of the litigants directly or indirectly funded political campaigns on my behalf, nor do I have personal knowledge of any disputed facts in the litigation.

Therefore, I again respectfully decline to recuse myself from this matter pursuant to Rule 29 of our Rules of Appellate Procedure, I can fairly sit on this matter and correctly and fairly apply the law.

I respectfully decline to step aside.

LVS:lw

xc: Other Justices (with motion)
James A. Walls, Esq.
W. Henry Jernigan, Jr., Esq.
David B. Fawcett, Esq.
David B. Cross, Esq.

APPENDIX D

Central West Virginia Energy Company,
Massey Energy Company, Appellants

v.

Wheeling Pittsburgh Steel Corporation; Mountain State Carbon, LLC, Appellees

Pre-Appeal No. 07-185

On the 10th day of March, 2008, the appellants in the instant case ("the *Wheeling-Pitt* case") filed a RENEWED JOINT MOTION TO RECUSE THE HONORABLE LARRY STARCHER. The appellants—referred to jointly as "Massey"—had previously filed a joint motion requesting the same relief on December 10, 2007. On December 19, 2007, I responded to that motion and declined to step aside. This is my response to the appellants' most recent motion.

I previously scheduled a public hearing on this motion, believing it would be helpful to orally hear from the parties' lawyers and to have those lawyers answer questions that bear on the reasons for the motion, and the standards they would have a judge apply in recusal matters. I believed it would be helpful for this particular case, and for recusals in future cases. However, following this Court's refusal of appellants' petition seeking the prohibition of the hearing, somewhat as a compromise with other members of the Court, and pending a decision by this Court in administrative conference on the issue of whether a single justice may hold a hearing on a recusal request, I canceled the hearing.

I then sent the appellants interrogatories that are pending. Because I have been advised that the

petition for appeal in the underlying case will be presented to this Court soon, and because I believe that I can make an informed and properly-grounded decision without receiving appellants' response to those interrogatories, I feel that I should respond to the motion at this time. The interrogatories are canceled —still, I believe that the appellants have an independent duty to disclose to this Court certain information related to their CEO's conduct, as further explained *infra*.

Relevant background for my decision includes the following: On February 15, 2008, I filed a statement announcing that I was stepping aside in a separate "Massey case," styled *A. T. Massey Coal Company, Inc., et al. v. Hugh M. Caperton, et al.* ("the *Caperton* case"). I said that I hoped that my voluntarily stepping aside in the *Caperton* case would be followed by the similar voluntary stepping aside of a justice whose election was supported by Massey's CEO, Mr. Don Blankenship, to the tune of over $3.5 million dollars. In my statement, I noted my previous stepping aside in a case years earlier over the issue of $36,000 in contributions to my campaign. I also noted in my recusal response in the *Caperton* case that it was this same justice's senior law clerk who (as a lawyer) argued in the earlier case that a judge should step aside when campaign contributions are, under the circumstances, sizable enough to suggest to the public in a given case an appearance of possible impropriety—in that instance $36,000.[1]

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[1] The senior law clerk once said that "campaign money can give an appearance of justice for sale," and said that substantial campaign contributions by a litigant "demeans the office of

I acted in the *Caperton* case because I wanted to help restore public confidence in this Court. But the hoped-for stepping aside by the justice whose election so greatly benefitted from Massey's CEO did not occur. Instead, that justice ended up as the Acting Chief Justice in the *Caperton* case. He appointed my replacement, and both he and my replacement cast votes for Massey in the rehearing of the *Caperton* case. As a result, it seems likely that public confidence in the Court's decision in the *Caperton* case is close to zero.

Now Massey is asking me to step aside in another case, because I have publicly criticized certain conduct of Massey's CEO—conduct that I believe has adversely affected the administration of justice in our State and has created a "cancer" in our Court. Just recently, some of Mr. Blankenship's conduct was reported on national television. Among other things, we learned that in July of 2006, Mr. Blankenship "bought dinner" for Mr. Blankenship's "good friend," the Chief Justice of this Court – while they were together on vacation in Monaco on the French Riviera—at a time when what ultimately became an over-seventy-million-dollar verdict against Massey was pending before this Court. We know that remaining on Massey cases was consistent with the Chief Justice's practice of routinely voting on Massey-related matters for years before and well after the Monaco trip, and that it was not until photographs of the Riviera vacation were disclosed that he began stepping aside in Massey cases.

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judge and destroys the public's confidence in the integrity and impartiality of the judiciary." As of April 24, 2008, an essay explaining the senior law clerk's position could be found at: http://www.wvcala.org/eye/cont_mcelwee.htm.

We were told on national television by the Chief Justice that Mr. Blankenship paid for at least one of the vacation dinners for the Chief Justice (and presumably for the Chief Justice's companion), and we know that the vacation was never disclosed to this Court or the public until very recently—after the photographs were publicly disclosed.

I have a pretty good idea—based on the photographs submitted to this Court, some under seal—that the dinner in question was not consumed at an IHOP or even an Applebee's. No—the meal that Mr. Blankenship likely bought for the Chief Justice was served in a very nice restaurant in or near the ancient principality of Monaco. Imagine the scene: It is the height of the summer "season" on the Riviera, when the world's wealthy come to Monaco, some by air and many by yachts, to gamble, socialize, drink, and dine. I really do not know the prices for meals in this rich man's world, but, for sure, they equal or are in excess of meals in even our most expensive American venues. A "dinner" —cocktails, appetizer, entree and dessert—in a Monte Carlo casino restaurant for four could well approach a thousand or more dollars. And we now *know* that Mr. Blankenship picked up *at least one* of these checks.

Just imagine—*with a seventy-million-dollar-plus case pending before the Justice who is seated across from him*, Mr. Blankenship leans forward and picks up the check, and says to his "good friend,"—"I'll get that, Judge."

I think a lot of people would like to see that check. Lacking the hard evidence of a receipt, most of us can only guess at the amount; if we did know the exact amount, I'd guess that we would be

shocked. Of course, I could be wrong. Maybe the foursome dined at the local Monte Carlo Subway. But the photographic evidence is to the contrary—and the best evidence would be the receipt, something that Mr. Blankenship could probably produce—if he wanted to.

When the photographs of the Monaco vacation were filed with this Court, and a clerk brought copies to my chambers, as well as to other justices' chambers, confirming rumors and reports that I had heard off and on for over a year, I was shocked. I had never seen those photographs before they were filed, and I had nothing to do with their disclosure to the lawyers for Mr. Caperton. The rumor mill has it that the photographs were taken on Mr. Blankenship's companion's camera; for those who are pursuing the trail of the photos, perhaps they should begin at the source, if they are sincere in wanting to learn about their distribution.

Those photographs were not posed to mislead, nor were they taken as part of a "police sting." They are not "entrapment" or "smears," nor are they a "setup." Those photographs are *evidence*—candid and damning photographic evidence of just how much how Mr. Blankenship's conduct has led to the national perception that our West Virginia Supreme Court of Appeals is "farcical." For some political spinmeisters, this evidence is deeply threatening and shameful. But there it is.

Since Massey likes to include press clippings with its motions, let me quote from an editorial in the *New York Times* of April 15, 2008, by Dorothy Samuels. Ms. Samuels says: "In West Virginia, meanwhile, the State Supreme Court's handling of a

case involving a large coal company, Massey Energy, took on a decidedly farcical flavor. For the second time, the appellate court threw out a $50 million verdict against Massey."

Ms. Samuels continues: "The court decided to rehear the case after photographs publicly surfaced of its chief justice, Elliott Maynard, vacationing in Monte Carlo with Massey's chief executive, Don Blankenship, in 2006, while the matter was pending in the Supreme Court. The chief justice disqualified himself from the rehearing. So did another justice, Larry Starcher, because he had publicly criticized Blankenship and his company. The 3-to-2 outcome in favor of Massey was unchanged from the first round, which might not have been noteworthy except that the deciding vote was cast once again by Justice Brent Benjamin, who declined to recuse himself despite owing his election to the court to more than $3 million spent by Mr. Blankenship. In response to such travesties, judicial reformers have stepped up their call for public financing and strict fund-raising rules for state judicial contests or a switch to a nonelective merit selection system."

"Farcical?" "Travesties?" Unfortunately, I think that Ms. Samuels has not overstated the case. How else are the owners and workers at the Caperton mines, or the stockholders and steelworkers at Wheeling-Pitt, entitled to feel, when they see this evidence? How else is the public entitled to feel about this evidence? How does this evidence – and the conduct that it reveals—affect public confidence in our Court system?

The *Code of Judicial Conduct*, Canon 4(D)(5) says: "A judge shall not accept . . . a gift, bequest,

favor, or loan from anyone except for . . . a gift . . . from a relative or close personal friend whose appearance or interest in a case would in any event require disqualification[.]" In other words, the only way that Mr. Blankenship could have legally bought that "dinner" for the Chief Justice was if the Chief Justice had already stepped aside in Massey cases—which he had not.

The photographs of the vacation, and the admission that Mr. Blankenship "bought dinner" for the Chief Justice on the Riviera—these undisputed facts reveal only a *portion of the truth* about Mr. Blankenship's conduct while Massey cases have been pending before this Court. The public and this Court have an absolute right to know *the complete truth.*

Just how many meals and drinks and other costs did Mr. Blankenship finance on the Monaco vacation —the Chief Justice seemed equivocal in his response to the ABC reporter, as did Mr. Blankenship when the photographs were first made public. What meals and drinks, if any, has Mr. Blankenship bought for the Chief Justice at *any* times when Massey had cases pending before this Court? Are there other favors or benefits that Mr. Blankenship has provided for the Chief Justice or his companion? (I frankly wonder whether Mr. Blankenship has ever disclosed to his lawyers his "good friendship" with the Chief Justice. If he did so, and they did not tell him that he must take appropriate action, then I would question those lawyers' judgment.)

And another question: What are the details of reported contacts by Mr. Blankenship and the Chief Justice with Court staff about the photographs and

the vacation? Has there been an attempt to shade the truth, or worse?

I think Massey should immediately produce and file with this Court the receipt for "the dinner" —and for all other entertainment or gifts to determine if the reports have any basis that Mr. Blankenship may have provided for the Chief Justice or his companion during the Monaco vacation. Massey should also provide a detailed list of and receipts for every other occasion that Mr. Blankenship has "bought dinner" for or provided anything of value to *any* justice of this Court while Massey had cases pending here; and the details of any occasions when any justice of this Court has "bought dinner" for Mr. Blankenship at a time when Massey had cases pending before this Court.

There has been a suggestion made that the "good friendship" between Mr. Blankenship and the Chief Justice is "common knowledge" and has been so for years. This is contrary to what I have been told over the years. Rather, to me, this seems to be a recently-manufactured response to the photographs having dropped into the public domain. Where is the evidence of this "common knowledge"? How could a "good friendship" that includes expensive dinner-buying, vacation-sharing, and whatever else—have been "commonly known" by members of the public like, say, the lawyers in the *Caperton* and *Wheeling-Pitt* cases – and those lawyers not make a motion to recuse the Chief Justice before the truth-telling photos were made public? The truth—*the truth*—is that the "good friends" relationship between the two and the details of that relationship have *never* been disclosed in any of Massey's considerable litigation.

I wonder why.

The foregoing discussion of improper conduct by Massey's CEO while Massey cases are pending before this Court provides the reason and sets the ground for my deciding whether I should step aside in the *Wheeling-Pitt* case—because of my publicly-stated low opinion of that CEO's conduct in relation to this Court. (I apologize for calling Mr. Blankenship "stupid" and a "clown." He is obviously an intelligent person. Intelligent people, however, can do stupid and even clownish things—I should know.)

I have stepped aside in a small number of cases in my judicial career, but rarely (if ever) because I seriously disapproved of the conduct of the person before me. That standard would be entirely unworkable. For example, I have reviewed the cases of many people who were convicted of heinous crimes like rape and child molestation and murder. In many of these cases, the defendant had confessed and was clearly guilty and I tended to have a personal dislike for the defendant. But some aspect of the defendant's case needed judicial review, notably sentencing. And while I strongly disapprove of rape, child molestation and murder, that doesn't mean I have to step aside in those cases.

But if a convicted child molester were also my "good friend" who had been buying me expensive dinners on the Riviera—then I think I should step aside.

Or if a convicted murderer, or his family, had donated nearly four million dollars to help my election, then I think I should step aside in that case, too, even if he hadn't bought me dinner.

I said in my statement in the *Caperton* case that my stepping aside might be a step in treating a "cancer on our Court"—but *only if* the Acting Chief Justice in that case would also step aside. Despite many calls for him to do so, he has chosen not to. One poll submitted to this Court found that 67% of average citizens thought he should step aside; another found that 88% thought the same.

Here's my quandary as a justice committed to doing justice and promoting public confidence in the courts: If I alone step aside in the instant *Wheeling-Pitt* case, my replacement will be selected by an Acting Chief Justice whose campaign was supported by over $3.5 million from the CEO of a litigant in the case, a man whose conduct in relation to this Court while that litigant had pending cases before this Court is under a grave cloud. And if I alone step aside, that Acting Chief Justice will both appoint my replacement and vote on issues affecting that litigant —even though according to the arguments of the Acting Chief Justice's Senior Law Clerk, a judge should step aside in such a case because of such reasonable concerns by the public. And if I alone step aside, then what will the parties to the lawsuit, and our citizens, think about the fairness of our Court?

In good conscience, trying my best to fulfill my responsibility to the people of West Virginia in difficult circumstances, I cannot step aside and allow this additional "travesty" to happen. I know that I can set aside my feelings about Mr. Blankenship's conduct, and fairly judge the legal issues involved—I have done it in hundreds of cases over the last three decades. Therefore, in the interest of justice, I respectfully decline to recuse myself although *I will step aside* following the very moment that the Acting

Chief Justice in this case does so, should he make that decision. And if he does not, I will give my best based on the law, secure in the knowledge that no litigant in the case has been my "good friend" or my great benefactor.

I again challenge all parties to read United States Supreme Court cases such as *Aetna Insurance Co. v. Lavoie*, 475 U.S. 813 (1986) and *In re Murchison*, 349 U.S. 133 (1955). If my decision to participate in the instant case can be argued to create due process problems of constitutional dimensions, so be it. If matters relating to Massey's treatment in our Court are addressed in the federal courts, or even by our Nation's highest court, we will surely be told that $3,500,000 in electoral support by the CEO of an active litigant in the Court is sufficient to create "an appearance of impropriety"—not to mention "the dinner," and the French (Riviera) Connection.

For the foregoing reasons, in the interest of justice, on this 24 day of April, 2008, I decline to recuse myself in the above-styled case.

/s/ Larry V. Starcher
Justice Larry V. Starcher

APPENDIX E

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC,

Plaintiffs,

v.

CENTRAL WEST VIRGINIA ENERGY COMPANY and MASSEY ENERGY COMPANY,

Defendants.

Civil Action No: 05-C-85

ORDER

This matter came before the Court on the 30th day of July 2007 for hearing on Motions filed by the parties subsequent to the jury trial in this matter. The Court heard argument from counsel on Defendant, Central West Virginia Energy Company's Motion for Judgment as a Matter of Law as to the Claims asserted in its First Supplement to Counterclaim against Plaintiff, Mountain State Carbon, LLC. The Court heard argument from counsel, as well as testimony of Plaintiffs' witness, on Plaintiffs' Motion to include Pre-Judgment Interest. Finally, the Court heard oral argument on Plaintiffs' Motion for the Court to Affirm the Jury's Award of Punitive Damages. The Court has reviewed the Motions, the Responses thereto, and the memoranda of law; considered all papers of record; heard the arguments of counsel; and reviewed all pertinent legal authorities.

Plaintiffs appeared by counsel, David B. Fawcett, Esquire and Gregory J. Krock, Esquire of Bu-

chanan, Ingersoll & Rooney, P.C., and David F. Cross, Esquire of Cross Law Offices; Defendant, Central West Virginia Energy Company, appeared by counsel James A. Walls, Esquire and Matthew P. Heiskell, Esquire of Spilman Thomas & Battle, PLLC; Defendant, Massey Energy Company, appeared by counsel W. Henry Jernigan, Jr., Esquire, of Dinsmore & Shohl, LLP.

Counterclaim of Defendant, Central West Virginia Energy Company

Defendant, Central West Virginia Energy Company, previously moved this Court for leave to file a Supplemental Counterclaim which leave was granted by the Court. The Court orally ruled that such counterclaim was strictly an issue of law that would be determined by the Court at the conclusion of the trial. The Court received no response from Plaintiffs to the Counterclaim. After the trial, Defendant moved for judgment as a matter of law. The Court received Plaintiffs' response to Defendant's Motion at the hearing.

Defendant argues that Plaintiff, Mountain State Carbon, did not pay the contractually agreed upon price for coal shipments made in November 2006 and December 2006. It is the position of Defendant that the contract amount per ton of coal changed effective November 1 of 2006 pursuant to the written agreement between the parties establishing the contractual year to be November 1 through October 31. Plaintiffs requested an opportunity to respond arguing that the parties established a course of conduct that altered the contractual year to a calendar year.

After reviewing the Motion of Defendant, the Response thereto, and the memoranda of law; considering all papers of record; hearing the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) The issues raised by Defendant's Counterclaim are strictly legal issues.

2) In order to determine the legal issues raised by the Counterclaim, the contract between the parties must be interpreted.

3) "It is the province of the court, and not of the jury, to interpret a written contract." Syl. Pt. 1, *Orteza* v. *Monongalia County General Hosp.*, 173 W.Va 461, 318 S.E.2d 40 (1984) quoting Syl. Pt. 1, *Stephens* v. *Bartlett*, 118 W.Va. 421, 191 S.E.2d 550 (1937).

4) "Where the terms of a contract are clear and unambiguous, they must be applied and not construed." Syl. Pt. 2, *Orteza* v. *Monongalia County General Hosp.*, 173 W.Va, 461, 318 S.E.2d 40 (1984) quoting Syl. Pt. 2, *Bethlehem Mines Corp.* v. *Haden*, 153 W.Va. 721, 172 S.E.2d 126 (1969).

5) The Coal Supply Agreement entered into between the parties is not ambiguous; therefore, the Court cannot look outside of the contract in making its determination regarding Defendant's Counterclaim.

6) In making its determination with regard to Defendant's Counterclaim, the Court did not consider any affidavits or trial testimony, but, rather, based its determination on the actual language of the contract between the parties.

7) The Coal Supply Agreement clearly defines the contract year to be November 1 through October 31; therefore, any modification to the price of coal made pursuant to the agreement between the parties would become effective November 1st of each contract year.

8) Defendant, Central West Virginia Energy Company, shipped to Plaintiff, Mountain State Carbon, 122,287 tons of coal in November and December 2006.

9) The price of coal increased by $34.65 per ton effective November 1, 2006.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Defendant, Central West Virginia Energy Company's Counterclaim against Mountain State Carbon is GRANTED; therefore, Defendant, Central West Virginia Energy Company, is entitled to an offset of the verdict rendered against it in the amount of $4,237,269.84 plus pre-judgment interest in the amount of $262,570.74; therefore, judgment is entered for Defendant, Central West Virginia Energy Company, on its counterclaim in the amount of $4,499,840.58.

Prejudgment Interest

Plaintiffs moved the Court to include prejudgment interest at the rate of 10% on the jury verdict. Defendants argued that a recent statutory change in West Virginia lowered the interest rate to 9.75% of a portion, if not all, of the jury's award.

After reviewing the Motion of Plaintiffs; considering all papers of record; hearing the testimony of Plaintiffs' witness and the arguments of counsel; and reviewing all pertinent legal authorities, the

Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) The West Virginia Legislature amended the statutory interest rate in June 2006 by amending *W.Va. Code § 56-6-31.*

2) Pursuant to this Amendment, the Supreme Court of Appeals of West Virginia entered an Administrative Order on the 2nd day of January 2007 establishing the rate of interest for the year 2007 to be 9.75% as determined by applying the standards set forth in *W. Va. Code § 56-6-31.*

3) For all applicable time periods prior to 2007, the statutory rate of interest was 10%.

4) Plaintiffs argue that their judgment falls within an exception set forth in *W.Va. Code § 56-6-31*, because the damages fell within the definition of special damages excluding it from the requirements of applying the lesser interest rate.

5) If an award falls within this exception, the applicable rate of interest is the interest rate from the year in which the right to bring the action accrued.

6) Plaintiffs' jury award does, in fact, fall within the statutory exception; therefore, Plaintiffs are entitled to receive pre-judgment interest in the amount of interest from the year in which the right to bring the action accrued; that being 10%.

7) Plaintiffs offered the testimony of their financial expert along with a report that he prepared calculating the amount of pre-judgment interest.

8) Plaintiffs' expert testified that pre-judgment interest on the jury's verdict at the rate of

10% would be Twenty-Four Million Fifty-Three Thousand Six Hundred Sixty-Nine Dollars ($24,053,669)

9) Plaintiffs' expert testified as an expert in his field that his basis for calculation was reasonable and acceptable in his profession.

10) Defendants did not produce any rebuttal evidence, but argued that and Plaintiffs' expert did not properly calculate the interest because he used the wrong dates when making his calculations.

11) The Court finds that the evidence produced by Plaintiffs was the best information available to the Court.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion to include Pre-Judgment Interest at the rate of 10% in the amount of Twenty-Four Million Fifty-Three Thousand Six Hundred Sixty-Nine Dollars ($24,053,669) is GRANTED.

Punitive Damages Award

Plaintiffs' moved the Court to affirm the Jury's Award of Punitive Damages because the conduct of Defendants was reprehensible when they made fraudulent misrepresentations to induce Plaintiffs to remain in the contract knowing that they would not supply Plaintiffs with the requisite coal in order to sell the coal to other customers at a higher price.

Defendants argue that their actions were not reprehensible, that the jury's verdict was clearly an award for breach of contract damages as opposed to a tort claim, and that such an award could lead to other claims that would be detrimental to their com-

panies. Defendants assert that the only way the jury could have found fraud was to conclude that Defendants had an obligation to disclose to Plaintiffs their sales to other customers, which Defendants assert that no such duty existed.

After reviewing the Motion of Plaintiffs, the Response thereto, and the memoranda of law; considering all papers of record; hearing the arguments of counsel; and reviewing all pertinent legal authorities, the Court hereby makes the following FINDINGS OF FACT and CONCLUSIONS OF LAW:

1) "Punitive damages must bear a reasonable relationship to the potential of harm caused by the defendant's actions." Syl. Pt. 1, *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

2) "When the trial court instructs the jury on punitive damages, the court should, at a minimum, carefully explain the factors to be considered in awarding punitive damages. These factors are as follows:

> (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
>
> (2) The jury may consider (although the court need not specifically in-

struct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.

(3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.

(4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.

(5) The financial position of the defendant is relevant."

Syl. Pt. 3, *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

3) "When the trial court reviews an award of punitive damages, the court should, at a mini-

mum, consider the factors given to the jury as well as the following additional factors:

> (1) The costs of the litigation;
>
> (2) Any criminal sanctions imposed on the defendant for his conduct;
>
> (3) Any other civil actions against the same defendant, based on the same conduct; and
>
> (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of litigation to the plaintiff.

Because not all relevant information is available to the jury, it is likely that in some cases the jury will make an award that is reasonable on the facts as the jury know them, but that will require downward adjustment by the trial court through remittitur because of factors that would be prejudicial to the defendant if admitted at trial, such as criminal sanctions imposed or similar lawsuits pending elsewhere against the defendant. However, at the option of the defendant, or in the sound discretion of the trial court, any of the above factors may also be presented to the jury." Syl. Pt. 4, *Garnes* v. *Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897 (1991).

4) Most, if not all, of the force majeure notices that this Court held valid on their face alleged that Defendants could not supply the requisite coal to Plaintiffs due to a railcar shortage.

5) The jury verdict form contained a specific question regarding the underlying incidents set forth in the force majeure notices.

6) The jury did not find that the underlying incidents set forth in the force majeure notices actually occurred and were the reasons for the coal shortages to Plaintiffs.

7) Based upon the jury's answers on the verdict form, it is clear the jury found the force majeure notices without a legal, factual basis.

8) In order for the jury to find that the force majeure notices were without a legal, factual basis, the jury must have concluded that Defendants created the railcar shortage by requesting that the rail carrier send more of its cars for shipment to higher paying customers.

9) Defendants made the fraudulent affirmative statement that they could not control the allocation of railcars.

10) However, the Court found it very suggestive of Defendants' ability to control the allocation of railroad cars when Plaintiff, Wheeling Pittsburgh Steel Corporation, advised Defendants it would have to shut down because they could not receive barge shipments, Defendants were able to immediately ship coal by railcars all of the way to Follansbee.

11) Moreover, it was in Defendants' best interest to keep Plaintiffs in the contract. If Defendants were found guilty of a breach and Plaintiffs were permitted to purchase coal from other suppliers, Defendants would have been forced to pay the difference in price over the life of the contract between Plaintiffs and Defendants.

12) The Defendants are sophisticated, knowledgeable companies that knew what they were doing when they manipulated and/or caused the railcar shortages.

13) The conduct of Defendants, assuring Plaintiffs that they would do everything possible to supply the requisite coal, persisted for over two years leaving Plaintiffs in an unfortunate position.

14) Defendants attempts to conceal their fraudulent conduct continued for that period.

15) In their attempts to conceal, Defendants blamed CSX Transportation, their railcar carrier.

16) Because of Defendants' conduct, the length of time that Plaintiffs continued to suffer damages lengthened and the amount of their damages increased.

17) Because Defendants didn't disclose that they had other international customers paying substantially higher prices for their coal, Plaintiffs remained in the contract. Subsequently, Plaintiffs were under pressure to remain in the contract resulting in harm to Plaintiffs.

18) The punitive damage award in this case bears a reasonable relationship to the harm caused by Defendants' conduct as well as to the compensatory damages awarded, considering that the combined punitive damages are less than the compensatory damage award.

19) Defendants' conduct is also found to be reprehensible.

20) Defendants alleged that a nonexistent railcar shortage was the reason that they could not

supply Plaintiffs with the coal they were contracted to sell.

21) Defendants did everything they could to encourage Plaintiffs to remain in the contract in order to sell enough coal to Plaintiffs to discourage an action for breach which would have cost Defendants substantially more over the life of the contract.

22) These actions by Defendants went on in excess of two years.

23) The award in this case will not bankrupt Defendants.

24) The Court was only made aware of one other lawsuit filed based on similar acquisitions against Defendant, Massey Energy Company.

25) The Court is of the opinion that it should not reduce the amount of damages based on potential awards or claims in other cases.

26) It will be for any future Courts deciding similar claims to consider this action.

27) Based on the massive amount of discovery and the length of the trial in this matter, the costs expended by Plaintiffs in prosecuting this action must have been substantial.

28) Even with the punitive damage award, Plaintiffs may never be made whole.

29) Just because the amount of damages were the same for both the breach of contract claim and the tort claim, this Court cannot find that the jury was awarding damages for breach of contract only.

30) In their verdict form, the jury clearly indicated that they found both Defendants to be guilty of fraud.

31) The Court is of the opinion that the jury did, in fact, award punitive damages as damages based on the fraud.

32) The Court is of the belief that the amount of damages in this case would be equal or close to the amount of profit Defendants derived from their fraud; however, after considering all of the other factors to be considered by the Court, the Court is of the opinion that the findings with regard to the other factors strongly support the verdict in this case.

WHEREFORE, it is ORDERED, ADJUDGED, and DECREED that Plaintiffs' Motion for the Court to Affirm the Jury's Award of Punitive Damages is GRANTED.

Jury Verdict

The trial of this matter commenced on the 30th day of May 2007 and concluded on the 2nd day of July 2007 upon the return of a unanimous jury verdict. Based upon such verdict and the rulings made herein:

It is hereby ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiffs, Wheeling Pittsburgh Steel Corporation and Mountain State Carbon, LLC, against Defendant, Central West Virginia Energy Company, in the amount of One Hundred Nineteen Million Eight Hundred Fifty Thousand Dollars ($119,850,000) plus prejudgment interest in the amount of Twenty-Four Million Fifty-Three Thousand, Six Hundred Sixty-

Nine Dollars ($24,053,669). Defendant, Massey Energy Company, is jointly and severally liable for the judgment entered in favor of Plaintiff, Wheeling Pittsburgh Steel Corporation.

It is further ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiff, Wheeling Pittsburgh Steel Corporation, against Defendant, Central West Virginia Energy Company, in the amount of Fifty Million Dollars ($50,000,000).

It is further ORDERED, ADJUDGED, and DECREED that judgment is entered on behalf of Plaintiff, Wheeling Pittsburgh Steel Corporation, against Defendant, Massey Energy Company, in the amount of Fifty Million Dollars ($50,000,000).

It is further ORDERED, ADJUDGED, and DECREED that Defendant, Central West Virginia Energy Company, is entitled to a set-off of the judgment against it in favor of Plaintiff, Mountain State Carbon, LLC, in the amount of $4,237,269.84 plus pre-judgment interest in the amount of $262,570.74.

The Clerk of the Circuit Court shall forward attested copies to all counsel of record.

ENTERED this 2nd day of August 2007.

/s/ Martin J. Gaughan
MARTIN J. GAUGHAN, CHIEF JUDGE
FIRST JUDICIAL CIRCUIT

By: Charmaine R. Galiano
Deputy

APPENDIX F

IN THE CIRCUIT COURT OF BROOKE COUNTY, WEST VIRGINIA

WHEELING PITTSBURGH STEEL CORPORATION and MOUNTAIN STATE CARBON, LLC,
Plaintiffs,
v.
CENTRAL WEST VIRGINIA ENERGY COMPANY AND MASSEY ENERGY COMPANY,
Defendants.

Civil Action No: 05-C-85

ORDER

Currently before the Court are Defendants' Joint Motions and Memorandums of Law for: Judgment as a Matter of Law or, in the alternative, a New Trial with regard to the Tort Claims and Punitive Damages Award; a New Trial based upon Improper Admission of 404(b) Evidence; based upon Bias and Prejudice of the Jury; a New Trial based upon Admission of Purported Expert Testimony of Alan Stagg.

This Court has reviewed the Defendants' Motions, the Memorandums of Law in Support, considered all papers of record, and reviewed all pertinent legal authorities. After careful consideration of Defendants' Motions for a New Trial, this Court is of the opinion that these matters were previously considered by the court.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for Judgment as a Matter of Law or, in the alternative, for a New Trial

with regard to the Tort Claims and Punitive Damages Award is **DENIED** without hearing.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Improper Admission of 404(b) Evidence is **DENIED** without hearing.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Bias and Prejudice of the Jury is **DENIED** without hearing.

WHEREFORE, it is **ORDERED, ADJUDGED**, and **DECREED** that Defendants' Joint Motion and Memorandum of Law for a New Trial based upon Admission of Purported Expert Testimony of Alan Stagg is **DENIED** without hearing.

The Clerk of the Circuit Court shall forward attested copies of this Order to all counsel of record.

ENTERED this 31st day of August 2007.

/s/ Martin J. Gaughan
MARTIN J. GAUGHAN, CHIEF JUDGE
First Judicial Circuit

By: /s/ Charmaine R. Galiano
Charmaine R. Galiano
Deputy

APPENDIX G

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "No State shall * * * deprive any person of life, liberty, or property without due process of law * * * ."

Rule 3 of the West Virginia Rules of Appellate Procedure provides:

> (a) *Time for Petition.* No petition shall be presented for an appeal from, or a writ of supersedeas to, any judgment, decree or order, which shall have been entered more than four months before such petition is filed in the office of the clerk of the circuit court where the judgment, decree or order being appealed was entered * * * .
>
> * * *

Rule 5 of the West Virginia Rules of Appellate Procedure provides:

> (a) *Time for Hearing.* If desired, counsel for the petitioner or a petitioner unrepresented by counsel shall request oral presentation of the petition in the docketing statement filed with the petition. The Court, at its discretion, may allow counsel for the petitioner or a petitioner unrepresented by counsel to make oral presentation, unless such right to orally present a petition is otherwise

> provided by law. The respondent shall not be entitled to participate in the oral presentation of the petition, unless otherwise provided by law.
>
> * * *

Rule 7 of the West Virginia Rules of Appellate Procedure provides:

> (a) *Rejection.* If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions.
>
> * * *

Rule 29 of the West Virgina Rules of Appellate Procedure provides:

> (a) *Motions for Disqualification.* In any proceeding, any party may file a written motion for disqualification of a justice within thirty days after discovering the ground for disqualification and not less than seven days prior to any scheduled proceedings in the matter. * * *
>
> (b) *Grounds for Disqualification.* A justice shall disqualify himself or

herself, upon proper motion or sua sponte, in accordance with the provisions of Canon 3(E)(1) of the Code of Judicial Conduct or, when sua sponte, for any other reason the justice deems appropriate.

* * *

(f) *Decision on Motion.* The justice shall promptly notify the Clerk of the Supreme Court of his or her decision on the motion for disqualification and the Clerk of the Supreme Court shall promptly notify the other justices and the parties of such decision.

APPENDIX H

STATE STATUTES GOVERNING APPEALS IN CIVIL AND CRIMINAL CASES

ALABAMA

CIVIL: ALA. CODE §§ 12-11-30, 12-22-2; ALA. R. APP. P. 39.

CRIMINAL: ALA. CODE §§ 12-3-9, 12-11-30, 12-22-130; ALA. R. APP. P. 39.

ALASKA

CIVIL & CRIMINAL: ALASKA STAT. § 22.05.010(a)-(b).

ARIZONA

CIVIL: ARIZ. REV. STAT. ANN. §§ 12-2101, 13-4031.

CRIMINAL: ARIZ. CONST. art. 2, § 24; ARIZ. REV. STAT. ANN. § 13-4031; ARIZ. R. CRIM. P. 31.19.

ARKANSAS

CIVIL: ARK. STAT. ANN § 16-67-308; ARK. SUP. CT. R. 1-2(a), (e); ARK. R. APP. P. 2.

CRIMINAL: ARK. STAT. ANN § 16-91-101(a); ARK. SUP. CT. R. 1-2(a), (e).

CALIFORNIA

CIVIL: CAL. CONST. art. VI, § 12; CAL. CODE CIV. P. § 904.1(a).

CRIMINAL: CAL. CONST. art. VI, §§ 11, 12(b), (d); CAL. PENAL CODE § 1237.

COLORADO

CIVIL: COLO. APP. R. 1(a)(1), 49.

CRIMINAL: COLO. REV. STAT. §§ 13-4-102, 16-12-101; COLO. APP. R. 49.

CONNECTICUT

CIVIL: CONN. GEN. STAT. ANN. §§ 51-197a, 52-263; CONN. R. APP. P. 61-1, 84-1.

CRIMINAL: CONN. GEN. STAT. ANN. § 54-95; CONN. R. APP. P. 61-6, 84-1.

DELAWARE

CIVIL: DEL. CONST. art. 4, § 11(1)(A); DEL CODE ANN., tit. 10, § 142.

CRIMINAL: DEL. CONST. art. 4, §§ 11(1)(b), 28; DEL. CODE ANN., tit. 11 § 5301.

DISTRICT OF COLUMBIA

CIVIL & CRIMINAL: D.C. STAT. § 11-721(a), (b).

FLORIDA

CIVIL: FLA. CONST. art. V, §§ 3, 4(b)(2); FLA. R. APP. P. 9.030(b)(1)(a).

CRIMINAL: FLA. CONST. art. V, §§ 3, 4(b)(1), 5(b); FLA. STAT. ANN. §§ 924.05-06.

GEORGIA

CIVIL & CRIMINAL: GA. CONST. art. VI, § 5 ¶¶ III, V; GA. STAT. ANN. §5-6-33(a).

HAWAII

CIVIL: HAW. REV. STAT. §§ 602-59, 641-1.

CRIMINAL: HAW. REV. STAT. §§ 602-59, 641-11.

IDAHO

CIVIL: IDAHO CODE ANN. §§ 1-2409, 13-201; IDAHO APP. R. 4, 11(a).

CRIMINAL: IDAHO CODE ANN. §§ 1-2406, 1-2409, 19-2801; IDAHO APP. R. 4, 11(c).

ILLINOIS

CIVIL & CRIMINAL: ILL. CONST. art. VI, §§ 4(b), (c), 6; ILL. SUP. CT. R. 315(a).

INDIANA

CIVIL & CRIMINAL: IND. CONST. art. 7, §§ 4, 6; IND. R. APP. P. 4(A)(1)(a), 5(A).

IOWA

CIVIL: IOWA R. APP. P. 6.1(1), 6.3.

CRIMINAL: IOWA CODE ANN. §§ 602.4102(2),(4), 602.5103(b), 814.6(1).

KANSAS

CIVIL: KAN. STAT. ANN. § 60-2102(a)(4).

CRIMINAL: KAN. STAT. ANN. §§ 20-3018(b), 22-3601, 22-3602.

KENTUCKY

CIVIL & CRIMINAL: KY. CONST. §§ 110(2)(b), 115; KY. REV. STAT. ANN. § 22A.020; KY. R. CIV. P. 76.20; KY. R. CRIM. P. 12.02.

LOUISIANA

CIVIL: LA. CODE CIV. PROC. ANN art. 2082, 2088, 2166(e).

CRIMINAL: LA. CODE CRIM. PROC. ANN. art. 911, 912.1.

MAINE

CIVIL: 14 ME. REV. STAT. ANN. §§ 1851, 1901.

CRIMINAL: 15 ME. REV. STAT. ANN. § 2111(1).

MARYLAND

CIVIL & CRIMINAL: MD. CODE ANN. CTS. & JUD. PROC. §§ 12-301, 12-307(4), 12-308, 12-403(a).

MASSACHUSETTS

CIVIL: MASS. GEN. LAWS. ch. 231 § 113, MASS. GEN. LAWS ANN. ch. 211A, §§ 10-11.

CRIMINAL: MASS. GEN. LAWS ANN. ch. 278, § 28; MASS. GEN. LAWS ANN. ch. 211A, § 10.

MICHIGAN

CIVIL: MICH. CT. R. 7.203(A)(1), 7.301.

CRIMINAL: MICH. COMP. LAWS ANN. §§ 600.215, 600.232, 770.3(1)(a); MICH. CT. R. 7.301.

MINNESOTA

CIVIL: MINN. R. CIV. APP. P. 103.03, 117, subd. 2.

CRIMINAL: MINN. R. CRIM. PROC. 28.02, subd. 2, 29.02, subd. 1-2.

MISSISSIPPI

CIVIL: MISS. CODE. ANN. §11-51-3.

CRIMINAL: MISS. CODE ANN. § 99-35-101.

MISSOURI

CIVIL: MO. CONST. art. V, §§ 3, 10; MO. ANN. STAT. § 512.020.

CRIMINAL: MO. CONST. art. V, §§ 3, 10; MO. ANN. STAT. § 547.070.

MONTANA

CIVIL: MONT. CODE ANN. § 3-2-203; MONT. R. APP. P. 1, 6.

CRIMINAL: MONT. CODE ANN. §§ 3-2-203, 46-20-104.

NEBRASKA

CIVIL & CRIMINAL: NEB. CONST. art. I, § 23, 25; NEB. REV. STAT. §§ 24-1107, 25-1912.

NEVADA

CIVIL: NEV. R. APP. P. 3A.

CRIMINAL: NEV. REV. STAT. § 177.015(1), (3).

NEW HAMPSHIRE

CIVIL & CRIMINAL: N.H. SUP. CT. R. 7.

NEW JERSEY

CIVIL: N. J. R. APP. PRAC. 2:2-1(b), 2:2-3.

CRIMINAL: N.J. CONST. Art. VI, § 5, p. 1(c); N. J. R. APP. PRAC. 2:2-1(a)-(b), 2:3-2.

NEW MEXICO

CIVIL & CRIMINAL: N.M. CONST. art. VI, § 2; N. M. STAT. ANN. §§ 34-5-8(A)(3), 34-5-14.

NEW YORK

CIVIL: N.Y. C.P.L.R. 5511, 5602(a).

CRIMINAL: N.Y. CRIM. PROC. LAW §§ 450.10(1), 450.70, 450.90; N.Y. C.P.L.R. 5602(a).

NORTH CAROLINA

CIVIL & CRIMINAL: N.C. GEN. STAT. §§ 7A-27(a)-(c), 7A-30, 31.

NORTH DAKOTA

CIVIL & CRIMINAL: N.D. CENT. CODE §§ 28-27-01, 29-28-02, 29-28-03, 29-28-06.

OHIO

CIVIL: OHIO CONST. art. IV, §§ 2(B)(2)(e), 3; OHIO REV. CODE ANN. § 2505.03(A).

CRIMINAL: OHIO CONST. art. IV, §§ 2(B)(2)(c), (e); OHIO REV. CODE ANN. § 2953.02.

OKLAHOMA

CIVIL: 12 OKLA. STAT. ANN §§ 951-952, 990(A); 20 OKLA. STAT. ANN. § 30.1.

CRIMINAL: 22 OKLA. STAT. ANN. § 1051(a).

OREGON

CIVIL: OR. REV. STAT. ANN. §§ 2.516, 2.520, 19.205(1), 19.245(1).

CRIMINAL: OR. REV. STAT. §§ 2.520, 138.040.

PENNSYLVANIA

CIVIL & CRIMINAL: PA. CONST. art. 5, § 9; 42 PA. CONST. STAT. ANN. §§ 722-724, 741-762, 5105(a).

RHODE ISLAND

CIVIL: R.I. GEN. LAWS §§ 9-24-1, 9-24-11.

CRIMINAL: R. I. GEN. LAWS §§ 9-24-11, 9-24-32.

SOUTH CAROLINA

CIVIL & CRIMINAL: S.C. CODE ANN. §§ 14-8-200, 14-8-210, 18-9-20; S.C. R. APP. PRAC. 201.

SOUTH DAKOTA

CIVIL: S.D. CODIFIED LAWS ANN. § 15-26(A)-3.

CRIMINAL: S.D. CODIFIED LAWS ANN. § 23A-32-2.

TENNESSEE

CIVIL: TENN. CODE ANN. § 16-4-108, TENN. R. APP. P. 3(a).

CRIMINAL: TENN. CODE ANN. §§ 16-5-108, 39-13-206; TENN. R. APP. P. 3(b), 11.

TEXAS

CIVIL: TX. GOV'T CODE ANN. §§ 22.007, 22.225; TX. CIV. PRAC. & REM. CODE ANN. § 51.012.

CRIMINAL: TEX. CONST. art. 5, § 5(b); TEX. CODE CRIM. P. ANN. art. 4.03, 44.02, 44.45.

UTAH

CIVIL: UTAH CONST. art. VIII, § 5; UTAH CODE ANN. §§ 78A-3-102, 78A-4-105.

CRIMINAL: UTAH CONST. art. I, § 12; UTAH CODE ANN. §§ 78A-3-102, 78A-4-103, 105.

VERMONT

CIVIL & CRIMINAL: VT. CONST. ch. 2, § 30, VT. STAT. ANN. tit. 13, § 7401 (2008).

VIRGINIA

CIVIL: VA. CODE. ANN. § 8.01-670(A)(3).

CRIMINAL: VA. CODE ANN. §§ 17.1-406(A)-(B), 17.1-411.

WASHINGTON

CIVIL: WASH. REV. CODE ANN. § 2.06.030; WASH. R. APP. P. 2.2(a)(1).

CRIMINAL: WASH. CONST. art. I, § 22; WASH. REV. CODE ANN. § 10.95.100.

WEST VIRGINIA

CIVIL & CRIMINAL: W. VA. CODE § 58-5-1(j); W. VA. R. APP. P. 7.

WISCONSIN

CIVIL & CRIMINAL: WISC. CONST. art. I, § 21; WIS. STAT. ANN. §§ 808.01, 808.03, 809.62 (civil appeals).

WYOMING

CIVIL: WYO. CONST. art. 5, § 18, WYO. R. APP. P. 2.01a.

CRIMINAL: WYO. CONST. art. 5, § 3; WYO. STAT. §§ 6-2-103, 7-12-101.